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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CHEVRON CORPORATION, *et al.*,
Petitioners,

v.

THE CITY OF LONG BEACH, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

A claim by plaintiffs filed in state court was removed to federal court because the plaintiffs had already litigated to conclusion the same claim against the same defendants in federal court. A Court of Appeals reversed and allowed the claim to go forward in state court solely because of subsequent events—namely, the Court of Appeals' reversal of entirely different claims between the parties. The questions are:

1. Whether a District Court's acceptance of removal jurisdiction may be reversed on the ground that it was rendered improper by the occurrence of a subsequent event.

2. Whether, if this Court grants petitioners' contemporaneously-filed petitions * in a related antitrust case and reverses that judgment, a contract judgment herein should also be reversed, the court below having deemed the relevant contract rights to flow from and be inextricable from the alleged violations of federal antitrust law.

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* Two related petitions are filed herewith: (1) *Standard Oil Company of California, et al.* v. *The City of Long Beach and the State of California*, and (2) *Exxon Corporation and Texaco, Inc.* v. *City of Long Beach, et al.*

PARTIES TO THE PROCEEDINGS

Petitioners in this Court and defendants-appellees below are Chevron Corporation, Exxon Corporation, Mobil Oil Corporation, Shell Oil Company, Texaco Inc., and Union Oil Company of California. The listing required by S. Ct. Rule 28.1 for each petitioner appears as Appendix Q hereto. Respondents in this Court and plaintiffs-appellants below are the City of Long Beach, the State of California, and the People of the State of California.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Chevron Corporation, Exxon Corporation, Mobil Oil Corporation, Shell Oil Company, Texaco Inc., and Union Oil Company of California respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in these proceedings on April 17, 1989.

OPINIONS BELOW

The April 17, 1989, opinion of the Court of Appeals is reported at 872 F.2d 1410 and is reprinted in the appendix hereto ("App.") at 1a. The opinion was amended on July 7, 1989, pursuant to an Order reprinted at App. 14a-15a. The opinion of the Court of Appeals in the related antitrust case is reported at 872 F.2d 1401 and is reprinted at App. 104a and 29a (amendment). The District Court issued several unreported memoranda decisions, which are reprinted at App. 31a, 43a, 49a, 53a, 57a, 62a, 68a, 82a and 88a.

JURISDICTION

The judgments of the Court of Appeals were entered on April 17, 1989, and timely petitions for rehearing were denied on September 22, 1989. App. 27a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 1441(a) of Title 28, United States Code, provides in pertinent part:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

STATEMENT OF THE CASE

1. *Preliminary Statement.* On April 17, 1989, the same Ninth Circuit panel issued two opinions disposing of three separate appeals in litigation arising from a 35-year contract between respondent City of Long Beach, California, and petitioner oil companies. One of the opinions reversed the District Court's grant of summary judgment in favor of the companies on the City's federal antitrust claims asserted in underlying litigation referred to as *Long Beach I. City of Long Beach* v. *Standard Oil Co.*, 872 F.2d 1401; App. 104a (with amendment at 29a). The other opinion relied upon the reversal in the antitrust case to in turn (1) reverse the District Court's grant of summary judgment in favor of the companies on certain contract claims asserted by the City in *Long Beach I*, and (2) overturn the District Court's decision to accept removal jurisdiction over another case, referred to by the Ninth Circuit as *Long Beach II*, filed by the City in state court, raising the same contract construction claim the District Court had

previously decided against the City as a matter of law. *California v. Chevron Corp.*, 872 F.2d 1410; App. 14a. This petition seeks review of the latter opinion on the ground that the Ninth Circuit erred in relying on subsequent events in assessing the propriety of removal.

Because the Ninth Circuit's decision in this proceeding was explicitly predicated upon its disposition of the antitrust appeal in *Long Beach I*, petitioners suggest that the Court consider this petition together with the petitions in the antitrust appeal. If either or both petitions in the *Long Beach I* antitrust appeal are granted, this case should be held for final disposition of the antitrust case. If the *Long Beach I* antitrust decision is affirmed, or if certiorari is denied in that case, certiorari should be granted in response to this petition and the judgment reversed.

2. *The Parties' Contractual Relationship.* Respondent City of Long Beach, both as proprietor and as trustee for respondent State of California, holds mineral rights to a portion of the Wilmington Field ("the Field"), a substantial oil field in southern California. In 1965 the City solicited and received competitive bids on a 35-year contract agreement that it had drafted relating to the Field. Successful bidders included petitioners Chevron Corporation, Exxon Corporation, Mobil Oil Corporation, Shell Oil Company, Texaco Inc., and Union Oil Company of California (these six firms may be collectively referred to hereinafter as "the defendants") and others. Bids were solicited on the basis of a percentage of "net profits," defined in the contract as the value of the oil—calculated under the contract's price formula—less production costs.

The City's contract required defendants to assume responsibility for developing and operating the Field and for taking and paying for the City's crude oil. It was not feasible for the City to specify a fixed price for the oil over the life of the contract. The City considered drafting the pricing provision in terms of a "fair and

reasonable price," but rejected such an approach for fear that, in the words of a City official, it "would create the kind of uncertainty which * * * would result in a very substantial discounting of the bid." [1] Instead, the City included what the court below described as "detailed" and "elaborate" provisions for determining the price of the oil over the 35-year life of the contract. App. 18a, 20a. Under the contract, the City is entitled to the highest price yielded by five alternate formulae, two of which involve "posted prices." (Posted prices are the prices that a refiner or other buyer may publicly announce it is willing to pay for the crude oil produced from a particular field should it elect to purchase such oil.) Some defendants posted prices in California, but others, including defendants Exxon, Shell and Texaco, did not.

The City did not want to rely solely on posted prices in the contract, however, because it recognized that a company "could post 'an arbitrarily low price' which would not be at market value." [2] The City's draftsman stated that "[t]o avoid reliance solely on the bidder's average posted price * * *, approximately 10 pages of conditions were added to the pricing provisions." [3] To prevent any "arbitrarily low" posting from influencing the price calculation, the City received the *highest* price from the five separate formulae; three of the formulae were based on prices actually paid by any purchaser rather than postings. In addition, the two formulae involving postings used the posting of any company, not just defendants or successful bidders, and only those that actually served as a basis for significant recent purchases apart from the contract. These provisions were added to

[1] Ct. App. Supp. ER 186; Ct. App. ER 246-247.

[2] Ct. App. Supp. ER 273.

[3] *Id.* at 273-274. As another official explained, "we endeavored to add several safeguard provisions to reduce the possibility that the majors would artificially depress their posted price for the Wilmington crude." Ct. App. ER 639.

the contract to afford, in the words of a City official, "complete protection against manipulation simply by posting." [4] Indeed, as both the District Court and the Court of Appeals recognized, nothing in the contract required the contracting companies to post prices at all. App. 19a, 50a-52a.

Petitioners were among the successful bidders on the contract, offering the City over 95 percent of the net profits from development of the Field. State officials regarded the winning bid as "higher than we dared hope for," noting that it was "almost inconceivable to get a higher bid or higher return." [5]

3. *Proceedings Below—Long Beach I.* In 1975, however, the City and its beneficiary, the State, brought suit in the United States District Court alleging that the defendants had conspired to fix and maintain posted prices at artificially low levels and as a result had made artificially low payments for the crude oil produced from the Field. The complaint asserted antitrust claims under both the Sherman Act and California's Cartwright Act and was construed to assert breach of an alleged implied contractual obligation of "good faith" to post prices at acceptable levels. This litigation became known as *Long Beach I.*

The District Court dismissed the contract claim in 1979. The court ruled that "nothing in the contract or in principles of fairness" obligated the defendants to post or pay prices comporting "with the views of the plaintiff or of the court as to what the true market price should be." App. 50a. Judge Gray pointed out that the City had considered pegging the price under its agreement with the defendants to "fair market value" but had rejected that approach out of concern that it would result in lower

[4] Ct. App. Supp. ER 278.

[5] *Id.* at 222-223, 229.

bids. App. 50a-51a. "Having done so," the court explained, the City "is hardly in a position now to impose upon the defendants that same uncertain standard." App. 51a. The court also noted that the City had a complete remedy under antitrust law for any conspiracy to manipulate posted prices, and was in fact pursuing that remedy. App. 50a, 54a.

The District Court certified the contract claim for appeal under 28 U.S.C. § 1292(b) in 1979 (App. 56a), but neither the City nor the State elected to take an immediate appeal. Instead, they reasserted the claim of an implied contractual obligation in a new suit brought against the defendants in Los Angeles Superior Court in 1985. That case was removed to the District Court by the defendants. Immediately after the District Court accepted jurisdiction, the plaintiffs voluntarily dismissed the new suit without prejudice.

Judge Gray subsequently granted summary judgment for the defendants on the antitrust claims in *Long Beach I* and, in 1986, entered final judgment under Fed. R. Civ. P. 54(b). In 1987, at defendants' request and over plaintiffs' opposition, he entered a judgment under Rule 54(b) on the "good faith" contract claim he had decided in 1979. Plaintiffs took separate appeals from those judgments.

4. *Proceedings Below—Long Beach II.* In 1986, while *Long Beach I* was still pending before the District Court, the City and the State brought another suit against the defendants in Los Angeles Superior Court. In this case, referred to here and by the Court of Appeals as *Long Beach II*,[6] the plaintiffs, without explicitly invoking the Sherman Act, asserted substantially the same antitrust and contract claims that they had asserted in *Long*

[6] The District Court referred to the 1985 suit brought in state court as *Long Beach II* and the proceedings in the 1986 suit as *Long Beach III*.

Beach I. Whereas the claims in *Long Beach I* had been limited to the period ending December 31, 1977, the newly asserted claims purported to cover the period from 1980 through 1985, and included new claims respecting the status of some of the defendants' private pipelines as public utilities under California law. Otherwise, the two cases were substantively equivalent.

The defendants removed the new action to the District Court, and the court accepted jurisdiction. In rejecting the plaintiffs' request that the entire case be remanded to state court, Judge Gray noted that the complaint "makes substantially the same allegation under the Cartwright Act that the plaintiffs charge under the Sherman Act in *Long Beach I.*" App. 65a. The court concluded that the pipeline public utility claims should be remanded to state court and that the principal antitrust claims also would be remanded if discovery produced "enough evidence of post-1979 conduct to warrant trial." App. 90a. As to the contract claims, however, particularly the claim of the existence of an implied contractual duty to post prices at certain levels, the court concluded that "[h]aving initially raised such issue in this court and lost, the doctrine of collateral estoppel precludes the plaintiffs from trying again in a different tribunal." App. 83a.

The plaintiffs thereafter again requested that the case be remanded to state court. The District Court again refused to remand:

> The plaintiffs filed Long Beach I in this court; a major contention in such action involved the "good faith" obligation to post and pay in accordance with fair market value. After thorough consideration, this court granted partial summary judgment to the defendants dismissing the "good faith" claim.
>
> * * * *
>
> [The] basic thrust [of the state court complaint] is the same "fair market value" contention that was raised in Long Beach I and dismissed. Under the

> foregoing circumstances and the principle of "artful pleading," the "good faith" claim in Long Beach [II] remains a federal claim and upon removal, this court acquired jurisdiction over it. [App. 89a.]

On July 30, 1987, the District Court entered judgment under Fed. R. Civ. P. 54(b) on both its previous ruling on the merits of the "good faith" posting claim in *Long Beach I* and its decision to accept removal jurisdiction and dismiss the *Long Beach II* "good faith" claim.

The City thus appealed separately from the *Long Beach I* antitrust ruling, the *Long Beach I* "good faith" ruling, and the decision in *Long Beach II*. The three unconsolidated appeals were heard by the same Ninth Circuit panel. On April 17, 1989, that panel issued two opinions disposing of the three appeals. The court reversed the grant of summary judgment on the *Long Beach I* antitrust claims, and in another opinion reversed the contract rulings in *Long Beach I* and *II* and further ruled that the District Court must remand *Long Beach II* to state court in light of the Ninth Circuit's reversal in *Long Beach I*.

With respect to the merits of the "good faith" claim, the panel acknowledged that, under the contract, "[t]he oil companies were not required to post prices," that three of the six defendant companies did not post prices at all, that the companies were not required "to post only one price, the 'true market price' of oil," and that they were in fact "allowed to post any price they wished." App. 19a, 20a. The panel nevertheless held that if, "as the City alleges, the oil companies engaged in anticompetitive activity, the market forces that would normally control price posting decisions would cease to operate," and that therefore the allegations of "anticompetitive activity" sufficed to create triable issues under the City's *contract* claim. App. 21a-22a.

Such activity, the court reasoned, would violate not only the antitrust laws but also an implied term in the

contract requiring the companies to post prices in "good faith":

> [T]he same anticompetitive price posting that would violate the antitrust law would also constitute bad faith dealing in violation of the state law duty of good faith * * *. The same questions of material fact that we find today regarding the antitrust claims * * * * also operate as questions of material fact regarding the elements of breach of duty and good faith. *For that reason*, the pendent claims considered here must be remanded to the district court along with the antitrust claims remanded in that case. [App. 22a (emphasis added).]

As to the removal of *Long Beach II*, the Court of Appeals did not disagree that, under this Court's decision in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2 (1981), a District Court has removal jurisdiction over an artfully pled complaint refiled in state court to avoid federal jurisdiction and decisions. The Ninth Circuit ruled, however, that its own subsequent reversal of the District Court's decision in *Long Beach I*—the decision plaintiffs went to state court to avoid—"removes any basis for federal court jurisdiction under the artful pleading doctrine." App. 26a.[7]

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[7] The Ninth Circuit did not make clear precisely what aspect of the rulings in the *Long Beach I* cases compelled its jurisdiction holding in *Long Beach II*. In its initial opinion, the court stated that its disposition of the "antitrust claims" dictated its ruling on removal. *See* App. 11a, 12a. In their petitions for rehearing, defendants pointed out that the District Court's decision to accept removal jurisdiction over the "good faith" contract claim refiled in state court was based on the preclusive effects of its prior rulings on the *contract* claims, not the antitrust claims, and plaintiffs in their response agreed that the Ninth Circuit's ruling was based on a "misapprehension." *See* Answer to Pets. for Reh. at 2. The court thereupon amended its opinion. The amendment carries forward the confusion, however, for the court simply replaced "antitrust" with "*Long Beach I*." App. 15a (*See* App. 24a, 26a).

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With The Established Rule That Events Subsequent To Removal Do Not Affect The Propriety Of Removal Jurisdiction

The Ninth Circuit ruled below that an event subsequent to the removal of *Long Beach II* to federal court—the court's own reversal of a decision in *Long Beach I*—required reversal of Judge Gray's decision to accept removal jurisdiction. App. 25a-26a. This holding conflicts with the rule established by this Court and uniformly applied in other Circuits that the propriety of removal is determined as of the time of removal, and subsequent events cannot retroactively overturn the acceptance of jurisdiction. This Court should grant the writ to resolve this stark conflict on a basic and recurring question of federal jurisdiction.

The plaintiffs initially chose to file their "good faith" claim in federal court—as part of *Long Beach I*—and vigorously pursued that claim to judgment in that case. The District Court determined that, having filed, litigated, and lost that claim in federal court, plaintiffs were not free to circumvent and undermine the jurisdiction and judgments of that court by refiling the same claim in state court rather than perfecting a federal appeal. *Federated Department Stores, Inc.* v. *Moitie, supra.*[8]

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[8] *Moitie* held that, under the applicable branch of the artful pleading doctrine, when a claim is adjudicated in federal court and the plaintiff subsequently refiles it in state court, the second action is properly removable in light of the "federal character" of the claim. 452 U.S. at 397 n.2. Federal removal jurisdiction exists in such a case on the basis of the "settled principle" that "courts 'will not permit plaintiff to use artful pleading to close off defendant's right to a federal forum' " for review of the federal adjudication. *Id.* (quoting 14 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3722, at 564-566 (1976)).

It is revealing that plaintiffs perfected an appeal of the District Court's initial good faith ruling to the Ninth Circuit only *after*

Plaintiffs argued before the Ninth Circuit that this Court's near-unanimous decision in *Moitie* was no longer good law, and that the principles set forth in *Moitie* could not support removal jurisdiction.[9] The Ninth Circuit, however, did not endorse that argument. Instead, the court assumed, without deciding, that the District Court's initial assertion of removal jurisdiction under *Moitie* had been proper. But it held that that assertion of jurisdiction in *Long Beach II* had been rendered improper by its own reversal of the District Court's decision in *Long Beach I*. By so holding, the court below flatly contravened the established rule that the propriety of removal is determined as of the time of removal, without regard to subsequent developments.

More than fifty years ago, this Court established the basic rule that events subsequent to removal do not operate to undo the decision to accept or reject jurisdiction. In the landmark case of *St. Paul Mercury Indemnity Co.* v. *Red Cab Co.*, 303 U.S. 283 (1938), the District Court accepted removal jurisdiction because the parties were diverse and the amount in controversy exceeded the jurisdictional limit. After removal, the plaintiff filed an amended complaint indicating that less than the jurisdictional amount was at issue. The plaintiff eventually recovered less than the jurisdictional amount and the defendant appealed. The Court of Appeals ruled that the case should have been remanded to state court, in light of the amended complaint.

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their effort to refile and relitigate the good faith claim in state court was twice frustrated by the District Court's decisions on removal jurisdiction. Plaintiffs could have appealed the initial good faith ruling when it was issued in 1979, because the court certified its order pursuant to 28 U.S.C. § 1292(b). Ct. App. ER 488-489. Plaintiffs did not perfect an appeal at that time, foregoing the opportunity and instead seeking recourse in the state courts.

[9] *See, e.g.*, Appellants' Br. at 17.

This Court reversed. Recognizing the enormous waste of judicial resources inherent in reopening a decision to accept removal jurisdiction on the basis of later developments in a case, the Court ruled that "events occurring subsequent to removal which reduce the amount recoverable, whether beyond the plaintiff's control or the result of his volition, do not oust the district court's jurisdiction once it has attached." [10]

Removal jurisdiction in *Smith* v. *Sperling*, 354 U.S. 91 (1957), also had been predicated on diversity of citizenship. Following removal, but while the case still was pending in District Court, the plaintiff died and was replaced by a nondiverse special administrator. This Court sustained the continued exercise of federal jurisdiction, explaining that "jurisdiction is tested by the facts as they existed when the action is bought." *Id.* at 93 n.1.[11]

This principle is not limited to issues concerning the amount in controversy, but extends to whatever basis of federal jurisdiction supports removal. As the Court held in *St. Paul*:

> It uniformly has been held that in a suit properly begun in the federal court the change of citizenship of a party does not oust the jurisdiction. *The same rule governs in a suit originally brought in a state court and removed to a federal court.* [303 U.S. at 294-295 (emphasis added).]

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[10] *Id.* at 293. This rule with respect to removal jurisdiction is a corollary of the rule applicable to jurisdiction in general. As Chief Justice Marshall noted for the Court long ago, "[i]t it quite clear, that the jurisdiction of the Court depends upon the state of things at the time of the action brought, and that after vesting, it cannot be ousted by subsequent events." *Mollan* v. *Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824). *See Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found.*, 484 U.S. 49, 69 (1987) (Scalia, J., concurring).

[11] *See also Morgan's Heirs* v. *Morgan*, 15 U.S. (2 Wheat.) 290 (1817) (citizenship); *Kirby* v. *American Soda Fountain Co.*, 194 U.S. 141 (1904) (amount in controversy).

Shortly after *St. Paul*, the Court reaffirmed this approach to considering the propriety of removal jurisdiction in *Pullman Co.* v. *Jenkins*, 305 U.S. 534 (1939). The case involved a single complaint with two causes of action, one of which was removable only if it were considered separate from the other. The Court of Appeals held that the one cause of action was removable, noting that while the causes did not appear separable at the time of the petition for removal, they did later, when the second amended complaint was filed. This Court rejected such an approach: "The second amended complaint should not have been considered in determining the right to remove which in a case like the present was to be determined according to the plaintiffs' pleading *at the time of the petition for removal.*" [12]

The issue frequently arises in cases involving both federal and state claims. Such cases are removable by virtue of the federal claims, with the federal court acquiring pendent jurisdiction over the state claims. When developments in the litigation after the acceptance of removal jurisdiction cause the federal claims to disappear from the case, the federal court does not thereby lose jurisdiction to consider the state claims, even though the original basis for removal jurisdiction no longer exists. *See Carnegie-Mellon University* v. *Cohill*, 484 U.S. 343 (1988) (federal court has jurisdiction over such a case with *discretion* to remand to state court).

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[12] *Id.* at 537 (emphasis added). The Court cited *St. Paul* and *Graves* v. *Corbin*, 132 U.S. 571, 585 (1890) ("The case as made by the bill, and *as it stood at the time of the petition for removal*, is the test of the right to removal") (emphasis added); *Louisville & Nashville R.R.* v. *Wangelin*, 132 U.S. 599, 601 (1890) (whether removal is warranted "is to be determined by the condition of the record in the state court at the time of the filing of the petition for removal"); *Salem Co.* v. *Manufacturers' Co.*, 264 U.S. 182, 189 (1929) ("The right of removal depends upon the case disclosed by the pleadings when the petition therefor is filed").

Until the decision below, this approach to removal jurisdiction was uniformly followed in the Circuits.[13] As leading commentators have concluded, "the jurisdiction of the federal courts over a properly removed action will not be defeated by later developments in the suit." [14]

This approach is supported not only by precedent but by logic as well. Permitting courts to revisit the decision to accept jurisdiction in light of subsequent developments would be extraordinarily wasteful of judicial resources and would add considerable friction to relations between state and federal courts. Cases would bounce back and forth between state and federal court as the litigation progressed or even, as here, as *related* litigation providing the basis for removal progressed. The rule in *St. Paul* and *Pullman* fixes one point in time for judging the propriety of removal jurisdiction, avoiding these difficulties.[15]

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[13] *See, e.g., New England Concrete Pipe Corp.* v. *D/C Systems of New England, Inc.*, 658 F.2d 867, 872 (1st Cir. 1981); *Westmoreland Hospital Ass'n* v. *Blue Cross*, 605 F.2d 119 (3d Cir. 1979) (propriety of remand decided "on the basis of the record in the State court presented *at the time the petition for removal is filed*") (emphasis in original), *cert. denied*, 444 U.S. 1077 (1980); *Abels* v. *State Farm Fire & Cas. Co.*, 770 F.2d 26, 29 (3d Cir. 1985); *Brown* v. *Eastern States Corp.*, 181 F.2d 26, 28-29 (4th Cir. 1950) ("the case is not to be remanded if it was properly removable upon the record as it stood at the time the petition for removal was filed"); *Nu-Way Systems of Indianapolis, Inc.* v. *Belmont Marketing*, 635 F.2d 617, 621 (7th Cir. 1980) ("The right to removal to a federal forum is, of course, generally established on the basis of the record as it stands at the time the petition for removal is filed"); *Crosby* v. *Paul Hardeman, Inc.*, 414 F.2d 1, 3 (8th Cir. 1969); *McLeod* v. *Cities Service Gas Co.*, 233 F.2d 242, 245-246 (10th Cir. 1956); *Coker* v. *Amoco Oil Co.*, 709 F.2d 1433, 1440 (11th Cir. 1983) (actions that "affected the pleadings after the time of removal * * * must be disregarded in determining removability").

[14] 14 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 3739 at 582 (1985).

[15] A concern about avoiding friction between federal and state courts, and promoting finality in removal decisions, led Congress

The Ninth Circuit below, however, took a different approach. It expressly did *not* rule that the District Court erred in accepting jurisdiction over *Long Beach II* at the time it did so. On the contrary, the Court of Appeals acknowledged that *Moitie* and its own precedents [16] established that a state claim barred by the preclusive effect of a prior federal decision could be viewed as an artfully pled federal claim, supporting removal jurisdiction. App. 25a. And the Ninth Circuit expressly did *not* reject the District Court's conclusion that the *Long Beach II* complaint was barred by the preclusive effect of the District Court's prior rulings in *Long Beach I*.[17] The sole basis for the Ninth Circuit's reversal of the District Court's decision to accept removal jurisdiction over *Long Beach II* was an event that occurred subsequent to the District Court's decision—the Ninth Circuit's own reversal of *Long Beach I*.

The Ninth Circuit's view is that the reversal "removes any basis for federal court jurisdiction under the artful pleading doctrine." App. 26a. That can only be true, however, if the decision to accept removal jurisdiction can be revisited in light of such a subsequent development, and if a subsequent development *can* "remove" a previ-

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generally to prohibit review of decisions to remand cases removed from state court. *See* 28 U.S.C. § 1447(d) ("An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise"). This Court's judge-made rule promotes the same sound policies. Although appellate review of a decision to *accept* removal jurisdiction is available, that review is limited to the facts as they existed at the time of removal .

[16] *See, e.g., Salveson* v. *Western States Bankcard Ass'n*, 731 F.2d 1423, 1427-29 (9th Cir. 1984).

[17] App. 25a. The Court of Appeals recognized that the District Court viewed the two claims as "factually identical," and it expressly stated that "we need not and do not express an opinion on the *res judicata* effects of the earlier federal judgment." App. 25a n.6.

ously sufficient basis for federal court jurisdiction. As this Court's precedents make clear, it cannot.[18]

Application of this general rule is particularly appropriate in the context of removal jurisdiction under *Moitie*, because the possibility or even pendency of an appeal does not affect the preclusive effect of a District Court decision.[19] The District Court's prior decisions rejecting plaintiffs' "good faith" claim in *Long Beach I* precluded the artfully pled claims refiled in state court as *Long Beach II*, despite the fact that the *Long Beach I* rulings could have been (and were eventually) in fact appealed. That preclusive effect provided the basis for removal jurisdiction under *Moitie*, and the District Court's decision on jurisdiction could not be retroactively overturned in light of the Ninth Circuit's later rulings in *Long Beach I*.

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[18] The Ninth Circuit's departure from the established rule was not simply a fluke limited to this case, but apparently reflects that Circuit's settled view, at least in cases in which removal jurisdiction is based on this Court's decision in *Moitie*. *See Ethridge* v. *Harbor House Restaurant*, 861 F.2d 1389, 1403 (9th Cir. 1988). In *Ethridge*, the District Court accepted removal jurisdiction of a 1987 state court complaint under *Moitie*, ruling that the complaint was an artfully pled effort to refile a 1986 claim previously dismissed by the District Court. Subsequently, the Court of Appeals reversed the dismissal of the 1986 complaint, and then held, as the court below did in this case, that this required reversal in turn of the decision to accept removal jurisdiction. *Id.* The Ninth Circuit is thus firmly settled on its position, which conflicts with the rule established by this Court that the propriety of removal is determined as of the time of removal.

[19] *See, e.g., Hunt* v. *Liberty Lobby*, 707 F.2d at 1493, 1497 (D.C. Cir. 1983) ("Under well-settled federal law, the pendency of an appeal does not diminish *res judicata* effect of a judgment rendered by a federal court"); *In re Ewing*, 852 F.2d 1057, 1060 (8th Cir. 1988) ("the pendency of an appeal does not diminish the *res judicata* effect of a judgment rendered by a federal court"). *See generally* 18 Wright, Miller & Cooper, *Federal Practice and Procedure* § 4433 at 305 (1981); 1B *Moore's Federal Practice* ¶ .416[3] at 521 (2d ed. 1988).

II. This Court Should Hold This Petition Pending Disposition Of The Related Antitrust Case

The Ninth Circuit ruled that "the same anticompetitive price posting that would violate the antitrust law would also constitute bad faith dealing" in violation of the good faith term it implied in the contract, and that the "same questions of material fact" found in the *Long Beach I* antitrust case required reversal of the *Long Beach I* contract case. App. 22a. The court below expressly recognized that the federal antitrust claims and the claims for breach of an implied contract term were redundant, ruling that the plaintiffs could not recover for both because they "are essentially two different claims for the same injury." App. 22a. Plaintiffs themselves acknowledged that any recovery on the "good faith" claim would be "totally duplicative" of any antitrust recovery they might receive.[20]

In view of what the court below did—to imply a new term in the contract mirroring the federal antitrust laws—plaintiffs can prevail on their *contract* claim only by proving a *conspiracy* to restrain trade, *i.e.*, the *same* conspiracy that the court below said would entitle them to prevail on their federal antitrust claim. It is, after all, only the same "anticompetitive price posting that would violate the antitrust law" which the court below ruled would violate the contract; the court recognized that the companies acting *alone* were "allowed to post any price they wished." App. 20a, 22a.

Accordingly, this case is intertwined with and flows from the decision on the antitrust claims in *Long Beach I*. The Ninth Circuit's decision in this case was based explicitly on its "reversal today of the *Long Beach I* judgments." App. 25a. If the Court grants certiorari to review the *Long Beach I* antitrust decision, this petition should be held pending disposition of that case on the

[20] Tr. of March 9, 1979, at 78.

merits. If this Court then reverses in that case, that would undercut the Ninth Circuit's own basis for reversing this case. In that event, this Court, without addressing the merits in this case, would simply vacate and remand for reconsideration in light of its decision in *Long Beach I*. For that reason, it would be appropriate for the Court to defer consideration of this petition until it has completed its consideration of the antitrust petitions in *Long Beach I*.

If the related antitrust petitions are denied, or if they are granted but the Court then affirms the judgment in that case on the merits, this petition then should be considered and granted. Because the Ninth Circuit manifestly erred in reversing the acceptance of removal jurisdiction on the basis of a subsequent event, this Court should grant review in order to resolve the conflict between the law of the Ninth Circuit and the law elsewhere on this important question of removal jurisdiction.

CONCLUSION

For the foregoing reasons, this Court should grant the writ and reverse the decision below.

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APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 87-6300/6629
D.C. No. CV-86-1771-WPG

PEOPLE OF THE STATE OF CALIFORNIA; CITY OF LONG BEACH, as Trustee for the State of California, and the State of California as Beneficiary,
Plaintiffs-Appellants,

v.

CHEVRON CORPORATION; UNOCAL CORPORATION; MOBIL OIL CORPORATION; SHELL OIL COMPANY; SHELL CALIFORNIA PRODUCTION, INC.; EXXON CORPORATION; EXXON COMPANY, USA; TEXACO, INC.,
Defendants-Appellees.

Nos. 87-6301/6628
D.C. No. CV-75-2232-WPG

In re: COORDINATED PRETRIAL PROCEEDINGS IN THE PETROLEUM PRODUCTS ANTITRUST LITIGATION

CITY OF LONG BEACH, as trustee for the State of California, and the State of California as beneficiary,
Plaintiff-Appellant,

v.

STANDARD OIL COMPANY OF CALIFORNIA, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
William P. Gray, District Judge, Presiding

Argued and Submitted
October 4, 1988—San Francisco, California

Filed April 17, 1989

Before: Mary M. Schroeder, Jerome Farris and Cecil F. Poole, Circuit Judges.

Opinion by Judge Schroeder

Counsel

Gary L. Halling, San Francisco, California, for the plaintiffs-appellants.

Darryl Snider, Los Angeles, California, for the defendants-appellees.

OPINION

SCHROEDER, Circuit Judge:

I. INTRODUCTION

We have before us for decision in this opinion two separate appeals arising from two separate actions filed by the City of Long Beach and the State of California against the defendant oil companies. The cases are but a part of long-standing litigation between these parties stemming from 1965 contracts between the City and the defendants for the sale of oil from the City's Wilmington offshore oil field tract.[1]

[1] Aside from the other opinion today, this case has also spawned the jurisdictional decisions of the Temporary Emergency Court of Appeals in *In re Coordinated Pre-Trial Proceedings in Petroleum Products Antitrust Litigation*, 761 F.2d 710 (Em. App. 1985) and *Petroleum Products Antitrust Litigation*, 830 F.2d 198 (Em. App.), *cert. denied*, 108 S. Ct. 466 (1987). A breach of contract claim continues in the District Court for the Central District of California as case No. CV-86-1771-WPG. Certain state law claims continue in litigation in California state court as case No. C587912 (L.A. County Super. Ct.).

The first appeal we decide in this opinion, *City of Long Beach v. Standard Oil Co.*, Nos. 87-6301 & 87-6628, involves the same district court action that spawned the separate appeal and opinion in Nos. 86-5859 & 86-5860, *City of Long Beach v. Standard Oil Co.*, —— F.2d —— (9th Cir. 1989), which we also decide today in a separate opinion. We refer to this underlying action as "*Long Beach I.*" The *Long Beach I* complaint alleged violations of the Sherman Act, California's Cartwright Act, and breach of contract, all resulting from alleged anticompetitive price fixing engaged in by the defendant oil companies. The other opinion today decides the appeal from the district court's grant of summary judgment against the plaintiffs on the antitrust counts of that complaint, and this opinion decides the appeal from the district court's award of summary judgment against the plaintiffs on the pendent state law claims. In the other opinion we reverse the dismissal of the antitrust claims, and we here reverse the dismissal of the pendent claims.

The second appeal decided in this opinion, *State of California v. Chevron Corp.*, Nos. 87-6300 & 87-6629, is from a grant of summary judgment in favor of the oil companies in a separate action brought by the same plaintiffs against the same defendants, but concerning a later time period. We refer to this action as "*Long Beach II.*" The plaintiffs originally filed *Long Beach II* in California state court alleging only claims arising under state law. The defendants removed the case to federal court and the district court accepted jurisdiction. The court awarded partial summary judgment to the defendants on the theory that the claims asserted were essentially the same as the pendent claims asserted in *Long Beach I* on which it had earlier awarded summary judgment for the defendants. Thus the district court's exercise of jurisdiction was predicated upon the validity of its original judgment on the pendent claims in *Long Beach I*. Because we reverse the *Long Beach I* judgment, we must reverse the *Long Beach II* judgment as well.

All grants of partial summary judgment were certified by the district court as proper interlocutory appeals under Fed. R. Civ. P. 54(b). This court has jurisdiction pursuant to 28 U.S.C. § 1291 (1982).

II. *LONG BEACH I*—THE PENDENT CLAIM FOR BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING IN THE UNDERLYING CONTRACT.

In March of 1965 plaintiff City of Long Beach entered into a contract with the defendant oil companies [2] and other oil companies [3] to convey to them substantial shares of the oil and gas production at the City's Wilmington offshore oil field tract. The oil companies were to drill for the oil and maintain the offshore oil production platforms, paying the City for all the oil produced.

The contract contained detailed provisions specifying the price the City was to receive. The oil companies were to pay the highest price computed by one of the four alternative methods contained in Article 9(b) of the contract:

> 1. The arithmetical average of the prices posted in the Field [4] by Continuing Purchasers . . . during the month . . . .
>
> 2. The arithmetical average of the prices posted in the Named Fields [5] by Continuing Purchasers . . . during the month . . . .

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[2] Original Defendants Chevron, Arco, Texaco, Unocal, Mobil, Shell, and Exxon all signed the original agreement. Arco has settled with the plaintiffs, and is not a party here.

[3] Pauley Petroleum, Inc. and Allied Chemical Corp. were signatories to the contract but were never named as defendants.

[4] The "Field" referred to is the Wilmington field itself.

[5] The "Named Fields" referred to are the Wilmington field and three other nearby oil fields in Southern California, Huntington Beach, Inglewood, and Signal Hill.

> 3. The weighted average of the Prices Paid by Substantial Purchasers for purchases of oil in the Field . . . during the calendar month . . . .
>
> 4. The weighted average of the Prices Paid by Substantial Purchasers for purchases of oil in the Named Fields . . . during the calendar month . . . .

If none of these four methods yielded an ascertainable price, then the contract provided that the oil sold was to be valued at "the actual current market price of such oil at the point of delivery determined on the basis of all available relevant and reliable information." The contract also contained a "most favored nation" clause, which ensured that the City received the highest price for any oil from the field purchased or exchanged by oil companies on a given day.

As can be seen from the contract terms, the price to be paid to the City was the higher of the price either actually paid by an oil company, or else posted by it. A posted price is a public announcement of prices that a crude oil buyer is willing to pay for crude oil of a particular gravity from a particular oil field. Only prices posted by "Continuing Purchasers" were to be used in the price computation. A "Continuing Purchaser" is defined by the contract as a purchaser who made certain minimum average daily purchases of oil in the previous year. These minimums were fairly large, being 1,000 barrels per day in the first year of the contract, and thereafter the lesser of 3,000 barrels per day or two and one-half percent of the average daily tract allocation. The oil companies were not required to post prices, and not every company actually did; Chevron, Arco, Mobil, and Union were the only purchasers regularly to post prices for the Wilmington field during the relevant period. The contract contained no explicit guidelines for determining the price to be posted.

The City alleges that the oil companies, beginning sometime after the contract was signed and continuing at

least through 1975, engaged in anticompetitive price fixing by posting and using prices that featured artificially high gravity price differentials, meaning that the companies paid too low a price for the heavier grades of crude produced at the Wilmington field. In addition to its antitrust allegations, the City alleged that the oil companies breached the express terms of the contract and violated statutory and common law duties of good faith and fair dealing by failing to set their prices in good faith and by failing to pay for the full value of oil they acquired as required by Article 9(b) of the contract.

The trial court granted summary judgment for the oil companies because it found that the contract did not obligate the oil companies to post a "true market price" for the oil. The court noted that the oil companies were under no obligation to post at all, and that a company desiring more or less incoming crude could post its prices lower or higher than the price posted by other companies in order to achieve this. It further observed that the parties had originally considered and rejected the idea of using fair market value as the sole pricing standard instead of using the posting/payment standards contained in Article 9(b).

As defendants point out, posting is only one part of an elaborate pricing scheme established by the City in order to obtain the highest possible price for its oil. That scheme includes several protection mechanisms meant to guard against posted prices that are too low. To begin with, the City receives the price of oil actually sold if that price exceeds the posted price, and the contract contains safeguard provisions to prevent an artificially high or low actual sales price from being used as an index price. Also, the only posted prices used are those of Continuing Purchasers who have a history of actually purchasing large quantities of crude oil from the field. Finally, the true market value of the oil as derived from other information sources is specified as a fallback price index

if the four specific posting/payment price provisions fail to provide an ascertainable value for the oil.

We agree with defendants and the district court that this carefully-drawn contract did not require defendants to post only one price, the "true market price" of the oil. The defendants were allowed to post any price they wished, so long as they posted their price in good faith. California law implies in every contract a covenant of good faith and fair dealing. *Seamen's Direct Buying Serv. v. Standard Oil Co.*, 36 Cal.3d 752, 768, 206 Cal. Rptr. 354, 362, 686 P.2d 1158, 1166 (1984); Cal. Com. Code § 1203. Good faith is defined as "honesty in fact and the observance of reasonable commercial standards of fair dealing." Cal. Com. Code § 2103. California law further requires that a party granted discretionary power under a contract, including the discretionary power to set prices, exercise that power in good faith. *Purdue v. Crocker Nat'l Bank*, 38 Cal.3d 913, 923, 216 Cal. Rptr. 345, 352, 702 P.2d 503, 510 (1958), *appeal dismissed*, 475 U.S. 1001 (1986); Cal. Com. Code § 2305(2).

The plaintiffs, however, do not claim that the contract required defendant to post the "true market price" of the oil. Rather, they claim that the contract required the defendants to perform all contract activities, including price posting, in a good faith manner that would lead to the determination of a fair price to be paid, as contemplated by all parties when they entered the agreement. The plaintiffs claim that the alleged anticompetitive price fixing circumvented the good faith expectations of the parties and converted an otherwise proper act like price posting into an exercise of bad faith.

The plaintiffs' claims have merit. The contractual right to post prices does not grant the defendants freedom to post artificially depressed anticompetitive prices in bad faith. The posted price provisions of Article 9(b) were put in the contract with a purpose; all parties must have intended the postings to serve as one reliable index, al-

though not the only one, of the true value of the oil in a competitive market. The parties intended that the oil companies would be free to post a higher or lower price and bring on the consequences of a smaller or larger incoming supply, as noted by the district court. This is what would have happened, of course, in a competitive environment.

However, if as the City alleges, the oil companies engaged in anticompetitive activity, the market forces that would normally control price posting decisions would cease to operate. Industry-wide posting of artificially depressed prices, coupled with use of three-cut exchanges that avoided dollar denomination of inter-company barter transactions, would destroy the value of the Article 9(b) pricing provisions as valid price indices. Regardless of the discretion granted by the contract, the posting of artificially depressed prices, like any other act in furtherance of the alleged anticompetitive behavior, would constitute a breach of good faith. Compliance with the letter of a contract's provisions does not constitute good faith if one's bad faith actions render those provisions invalid or inoperative.

Thus, the same anticompetitive price posting that would violate the antitrust law would also constitute bad faith dealing in violation of the state law duty of good faith imposed by Cal. Com. Code § 1203. The same questions of material fact that we find today regarding the antitrust claims in *City of Long Beach v. Standard Oil Co.* also operate as questions of material fact regarding the elements of breach of duty of good faith. For that reason, the pendent claims considered here must be remanded to the district court along with the antitrust claims remanded in that case.

We note, however, that the plaintiff's antitrust claim and the breach of good faith claim are both predicated on the same conduct of the defendants, the anti-competitive price posting. They also both result in the same harm,

underpayment to the City for its oil. On remand, therefore, the district court should take all necessary steps to ensure that the plaintiff is not permitted double recovery for what are essentially two different claims for the same injury. *See, e.g., Foster v. Financial Technology, Inc.*, 517 F.2d 1068, 1072 (9th Cir. 1975).

III. *LONG BEACH II*—THE APPEAL FROM THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT FOR THE DEFENDANTS AFTER REMOVAL FROM STATE COURT.

In February 1986, eleven years after *Long Beach I* began, and eight months after the summary judgment order that disposed of the last portion of the plaintiffs' case in *Long Beach I*, plaintiff State of California filed an action in state court naming the same defendants but alleging causes of action that arose only under state law and covered only the period between 1980 and 1985. These included: (1) unfair competition and breach of duty to the public trust; (2) breach of two contracts, the Contractor's Agreement at issue in *Long Beach I* and the "LBOD Agreement," a separate operating and drilling contract; (3) breach of the implied covenant of good faith and fair dealing; (4) fraud, deceit, and negligent misrepresentation; (5) three counts of improper operation of intrastate pipelines; (6) violation of state antitrust laws; and (7) violation of state trade laws based upon the other counts.

The defendants removed the action to federal court, where the plaintiffs moved to remand the action to state court. The district court remanded three claims of violations regarding intrastate pipelines to state court, and granted summary judgment in favor of defendants on five claims of unfair competition, breach of contract and good faith, and fraud, leaving two claims to go forward, one for antitrust violation of California's Cartwright Act, and a second derivative from the first, for civil penalties under California's Business and Professions Code. Plain-

tiffs appeal the retention of federal jurisdiction and the grant of partial summary judgment against them. They contend that all of their claims belong in the state court. We agree that the district court must remand.

Normally a suit may be removed from state court to federal court only if the action could have been filed originally in federal court. 28 U.S.C. §§ 1331, 1441; *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 107 S. Ct. 2425, 2429 (1987). Normally a plaintiff may avoid federal jurisdiction by exclusive reliance on state law. *Id.* However, the "artful pleading doctrine" is sometimes used to recharacterize a plaintiff's complaint when a plaintiff attempts to mischaracterize the nature of his claim as arising under state law when it is actually federal. *See Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2 (1981). "[I]n many contexts plaintiff's claim may be one that is exclusively governed by federal law, so that the plaintiff necessarily is stating a federal cause of action, whether he chooses to articulate it that way or not." *Sullivan v. First Affiliated Sec., Inc.*, 813 F.2d 1368, 1372 (9th Cir.) (quoting 14A C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3722 at 268-75 (2d ed. 1985)), *cert. denied*, —— U.S. ——, 108 S. Ct. 150 (1987).

In *Sullivan* we observed that the artful pleading doctrine has been used to allow removal where a state claim was filed to circumvent the res judicata impact of a federal judgment. *Id.* at 1376 (discussing *Moitie*). To remedy such a situation the court "can recharacterize a state claim barred by the res judicata effect of a federal judgment as an artfully pleaded federal claim." *Id.; see also Salveson v. Western States Bankcard Ass'n.*, 731 F.2d 1423, 1427-29 (9th Cir. 1984).

The district court in this case believed that such an application of the artful pleading doctrine required denial of remand of plaintiffs' claims to state court even though they did not state any federal causes of action. It saw this

case as similar to *Moitie* because it believed its earlier dismissal of the federal antitrust claims required dismissal of the state claims on res judicata grounds, and that removal to federal court was needed to protect its earlier federal judgment. It concluded that plaintiffs' complaint was an artful attempt to recast the earlier federal antitrust claims as state claims. The court said:

> It is true that [*Long Beach II*] *asserts no federal* claim. However, as is noted above, it makes substantially the same antitrust allegation under the Cartwright Act that the plaintiffs charge under the Sherman Act in *Long Beach I*. Having initially cast their action in federal terms, the doctrine of artful pleading prevents the plaintiffs from starting over again with the same claim by resorting to state law in a state court. *See* [*Federated*] *Department Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2 (1981).

The district court's resort to the artful pleading doctrine raises two problems. First, it is unclear whether the prior federal judgment in this case actually would have operated as a res judicata bar to the state law claims being brought. A judgment covering an earlier time period need not necessarily operate as a res judicata bar to a lawsuit covering a later period even though both suits involve essentially the same course of wrongful conduct. *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322 (1955). Simply alleging the same type of claims against the same defendants for a later period does not guarantee a res judicata bar, because factual matters, such as the conduct of the parties since the first judgment, must be considered.[6] *See id.* at 328; *see also Eichman v. Fotomat Corp.*, 759 F.2d 1434, 1438-39 (9th Cir.

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[6] We note that the trial court believed that the two claims were factually identical. Due to our holding, we need not and do not express an opinion on the res judicata effects of the earlier federal judgment.

1985) (discussing res judicata doctrine under California law).

Second, our reversal today of the *Long Beach I* judgments undercuts the basis for applying the doctrine. We held in *Sullivan* that the existence of ongoing parallel state and federal suits does not permit removal of the state case under the artful pleading doctrine. There we refused to apply the doctrine and ordered remand of state law claims to state court where parallel lawsuits of state law claims in state court and federal claims in federal court were simultaneously ongoing. We narrowly construed *Moitie* as permitting removal under the doctrine only of "state claims precluded by the res judicata effect of a federal judgment." *Sullivan*, 813 F.2d at 1376. This is a similar situation.

No res judicata preclusion of state law claims occurred in *Sullivan* because the federal action had not yet gone to judgment. Without such preclusion, plaintiff's pleading of state law claims in state court, even if artful, did not "close off defendant's right to a federal forum." *Moitie*, 452 U.S. at 397 n.2 (quoting 14 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3722 at 564-66 (1976)). To allow this type of removal except where a final federal judgment wholly precludes the state court suit would violate "the paramount policies embodied in the well-pleaded complaint rule—that the plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint, and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court." *Caterpillar*, 107 S. Ct. at 2433.

Our action today renders this case squarely within the rule of *Sullivan*. There is no res judicata preclusion arising from the judgment on the antitrust claims, because we have in this and the accompanying opinion reversed the district court's summary judgment orders on all

claims in *Long Beach I*. Our reversal removes any basis for federal court jurisdiction under the artful pleading doctrine. We therefore reverse the district court's entry of judgment and remand in order for the district court, in turn, to remand the removed claims to the state court. The state court is competent to deal with this situation, even if the federal case goes to judgment:

> The res judicata impact of a federal judgment is a question of federal law which a state court is bound to apply under the Supremacy Clause. The state court is competent to apply federal res judicata in the state law suit, and res judicata would be interposed as a defense which ordinarily would not support removal.

Sullivan, 813 F.2d at 1376 (citations omitted). Any issues concerning the priority of the litigation, possible preclusion of issues, and the manner in which the state court action should proceed in relation to the ongoing federal court action in *Long Beach I*, should be considered by the state court.

The judgments are REVERSED AND REMANDED for further action consistent with this opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 87-6300/6629
D.C. No. CV-86-1771-WPG

PEOPLE OF THE STATE OF CALIFORNIA; CITY OF LONG BEACH, as Trustee for the State of California, and the State of California as Beneficiary,

Plaintiffs-Appellants,

v.

CHEVRON CORPORATION; UNOCAL CORPORATION; MOBIL OIL CORPORATION; SHELL OIL COMPANY; SHELL CALIFORNIA PRODUCTION, INC.; EXXON CORPORATION; EXXON COMPANY, USA; TEXACO, INC.,

Defendants-Appellees.

No. 87-6301/6628
D.C. No. CV-75-2232-WPG

In re: COORDINATED PRETRIAL PROCEEDINGS IN THE PETROLEUM PRODUCTS ANTITRUST LITIGATION.

CITY OF LONG BEACH, as trustee for the State of California, and the State of California as beneficiary,

Plaintiff-Appellant,

v.

STANDARD OIL COMPANY OF CALIFORNIA, *et al.*,

Defendants-Appellees.

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Central District of California
William P. Gray, District Judge, Presiding

Argued and Submitted
October 4, 1988—San Francisco, California

Filed April 17, 1989
Amended July 7, 1989

Before: Mary M. Schroeder, Jerome Farris and
Cecil F. Poole, Circuit Judges.

Opinion by Judge Schroeder

Counsel

Gary L. Halling, San Francisco, California, for the plaintiffs-appellants.

Darryl Snider, Los Angeles, California, for the defendants-appellees.

ORDER

The opinion filed on April 17, 1989, is amended as follows:

On page 3952 of the slip opinion, the words "federal antitrust" in the second sentence of the second full paragraph are deleted and the words "*Long Beach I*" are inserted.

On page 3954 of the slip opinion, the word "antitrust" in the second sentence of the first full paragraph is deleted and the words "*Long Beach I*" are inserted.

OPINION

SCHROEDER, Circuit Judge:

I. INTRODUCTION

We have before us for decision in this opinion two separate appeals arising from two separate actions filed by the City of Long Beach and the State of California against the defendant oil companies. The cases are but a part of long-standing litigation between these parties stemming from 1965 contracts between the City and the defendants for the sale of oil from the City's Wilmington offshore oil field tract.[1]

The first appeal we decide in this opinion, *City of Long Beach v. Standard Oil Co.*, Nos. 87-6301 & 87-6628, involves the same district court action that spawned the separate appeal and opinion in Nos. 86-5859 & 86-5860, *City of Long Beach v. Standard Oil Co.*, —— F.2d —— (9th Cir. 1989), which we also decide today in a separate opinion. We refer to this underlying action as "*Long Beach I.*" The *Long Beach I* complaint alleged violations of the Sherman Act, California's Cartwright Act, and breach of contract, all resulting from alleged anticompetitive price fixing engaged in by the defendant oil companies. The other opinion today decides the appeal from the district court's grant of summary judgment against the plaintiffs on the antitrust counts of that complaint, and this opinion decides the appeal from the district court's award of summary judgment against the plaintiffs on the pendent state law claims. In the other opinion we reverse the dismissal of the antitrust claims, and we here reverse the dismissal of the pendent claims.

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[1] Aside from the other opinion today, this case has also spawned the jurisdictional decisions of the Temporary Emergency Court of Appeals in *In re Coordinated Pre-Trial Proceedings in Petroleum Products Antitrust Litigation*, 761 F.2d 710 (Em. App. 1985) and *Petroleum Products Antitrust Litigation*, 830 F.2d 198 (Em. App.), *cert. denied*, 108 S. Ct. 466 (1987). A breach of contract claim continues in the District Court for the Central District of California as case No. CV-86-1771-WPG. Certain state law claims continue in litigation in California state court as case No. C587912 (L.A. County Super. Ct.).

The second appeal decided in this opinion, *State of California v. Chevron Corp.*, Nos. 87-6300 & 87-6629, is from a grant of summary judgment in favor of the oil companies in a separate action brought by the same plaintiffs against the same defendants, but concerning a later time period. We refer to this action as "*Long Beach II.*" The plaintiffs originally filed *Long Beach II* in California state court alleging only claims arising under state law. The defendants removed the case to federal court and the district court accepted jurisdiction. The court awarded partial summary judgment to the defendants on the theory that the claims asserted were essentially the same as the pendent claims asserted in *Long Beach I* on which it had earlier awarded summary judgment for the defendants. Thus the district court's exercise of jurisdiction was predicated upon the validity of its orginal judgment on the pendent claims in *Long Beach I.* Because we reverse the *Long Beach I* judgment, we must reverse the *Long Beach II* judgment as well.

All grants of partial summary judgment were certified by the district court as proper interlocutory appeals under Fed. R. Civ. P. 54(b). This court has jurisdiction pursuant to 28 U.S.C. § 1291 (1982).

II. *LONG BEACH I*—THE PENDENT CLAIM FOR BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING IN THE UNDERLYING CONTRACT.

In March of 1965 plaintiff City of Long Beach entered into a contract with the defendant oil companies [2] and other oil companies [3] to convey to them substantial shares of the oil and gas production at the City's Wilmington

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[2] Original Defendants Chevron, Arco, Texaco, Unocal, Mobil, Shell, and Exxon all signed the original agreement. Arco has settled with the plaintiffs, and is not a party here.

[3] Pauley Petroleum, Inc. and Allied Chemical Corp. were signatories to the contract but were never named as defendants.

offshore oil field tract. The oil companies were to drill for the oil and maintain the offshore oil production platforms, paying the City for all the oil produced.

The contract contained detailed provisions specifying the price the City was to receive. The oil companies were to pay the highest price computed by one of the four alternative methods contained in Article 9(b) of the contract:

> 1. The arithmetical average of the prices posted in the Field [4] by Continuing Purchasers . . . during the month . . . .
>
> 2. The arithmetical average of the prices posted in the Named Fields [5] by Continuing Purchasers . . . during the month . . . .
>
> 3. The weighted average of the Prices Paid by Substantial Purchasers for purchases of oil in the Field . . . during the calendar month . . . .
>
> 4. The weighted average of the Prices Paid by Substantial Purchasers for purchases of oil in the Named Fields . . . during the calendar month . . . .

If none of these four methods yielded an ascertainable price, then the contract provided that the oil sold was to be valued at "the actual current market price of such oil at the point of delivery determined on the basis of all available relevant and reliable information." The contract also contained a "most favored nation" clause, which ensured that the City received the highest price for any oil from the field purchased or exchanged by oil companies on a given day.

As can be seen from the contract terms, the price to be paid to the City was the higher of the price either ac-

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[4] The "Field" referred to is the Wilmington field itself.

[5] The "Named Fields" referred to are the Wilmington field and three other nearby oil fields in Southern California, Huntington Beach, Inglewood, and Signal Hill.

tually paid by an oil company, or else posted by it. A posted price is a public announcement of prices that a crude oil buyer is willing to pay for crude oil of a particular gravity from a particular oil field. Only prices posted by "Continuing Purchasers" were to be used in the price computation. A "Continuing Purchaser" is defined by the contract as a purchaser who made certain minimum average daily purchases of oil in the previous year. These minimums were fairly large, being 1,000 barrels per day in the first year of the contract, and thereafter the lesser of 3,000 barrels per day or two and one-half percent of the average daily tract allocation. The oil companies were not required to post prices, and not every company actually did; Chevron, Arco, Mobil, and Union were the only purchasers regularly to post prices for the Wilmington field during the relevant period. The contract contained no explicit guidelines for determining the price to be posted.

The City alleges that the oil companies, beginning sometime after the contract was signed and continuing at least through 1975, engaged in anticompetitive price fixing by posting and using prices that featured artificially high gravity price differentials, meaning that the companies paid too low a price for the heavier grades of crude produced at the Wilmington field. In addition to its antitrust allegations, the City alleged that the oil companies breached the express terms of the contract and violated statutory and common law duties of good faith and fair dealing by failing to set their prices in good faith and by failing to pay for the full value of oil they acquired as required by Article 9(b) of the contract.

The trial court granted sumary judgment for the oil companies because it found that the contract did not obligate the oil companies to post a "true market price" for the oil. The court noted that the oil companies were under no obligation to post at all, and that a company desiring more or less incoming crude could post its prices

lower or higher than the price posted by other companies in order to achieve this. It further observed that the parties had originally considered and rejected the idea of using fair market value as the sole pricing standard instead of using the posting/payment standards contained in Article 9(b).

As defendants point out, posting is only one part of an elaborate pricing scheme established by the City in order to obtain the highest possible price for its oil. That scheme includes several protection mechanisms meant to guard against posted prices that are too low. To begin with, the City receives the price of oil actually sold if that price exceeds the posted price, and the contract contains safeguard provisions to prevent an artifically high or low actual sales price from being used as an index price. Also, the only posted prices used are those of Continuing Purchasers who have a history of actually purchasing large quantities of crude oil from the field. Finally, the true market value of the oil as derived from other information sources is specified as a fallback price index if the four specific posting/payment price provisions fail to provide an ascertainable value for the oil.

We agree with defendants and the district court that this carefully-drawn contract did not require defendants to post only one price, the "true market price" of the oil. The defendants were allowed to post any price they wished, so long as they posted their price in good faith. California law implies in every contract a covenant of good faith and fair dealing. *Seaman's Direct Buying Serv. v. Standard Oil Co.*, 36 Cal.3d 752, 768, 206 Cal. Rptr. 354, 362, 686 P.2d 1158, 1166 (1984); Cal. Com. Code § 1203. Good faith is defined as "honesty in fact and the observance of reasonable commercial standards of fair dealing." Cal. Com. Code § 2103. California law further requires that a party granted discretionary power under a contract, including the discretionary power to

set prices, exercise that power in good faith. *Purdue v. Crocker Nat'l Bank*, 38 Cal.3d 913, 923, 216 Cal. Rptr. 345, 352, 702 P.2d 503, 510 (1985), *appeal dismissed*, 475 U.S. 1001 (1986); Cal. Com. Code § 2305(2).

The plaintiffs, however, do not claim that the contract required defendants to post the "true market price" of the oil. Rather, they claim that the contract required the defendants to perform all contract activities, including price posting, in a good faith manner that would lead to the determination of a fair price to be paid, as contemplated by all parties when they entered the agreement. The plaintiffs claim that the alleged anticompetitive price fixing circumvented the good faith expectations of the parties and converted an otherwise proper act like price posting into an exercise of bad faith.

The plaintiffs' claims have merit. The contractual right to post prices does not grant the defendants freedom to post artificially depressed anticompetitive prices in bad faith. The posted price provisions of Article 9(b) were put in the contract with a purpose; all parties must have intended the postings to serve as one reliable index, although not the only one, of the true value of the oil in a competitive market. The parties intended that the oil companies would be free to post a higher or lower price and bring on the consequences of a smaller or larger incoming supply, as noted by the district court. This is what would have happened, of course, in a competitive environment.

However, if as the City alleges, the oil companies engaged in anticompetitive activity, the market forces that will normally control price posting decisions would cease to operate. Industry-wide posting of artificially depressed prices, coupled with use of three-cut exchanges that avoided dollar denomination of inter-company barter transactions, would destroy the value of the Article 9(b) pricing provisions as valid price indices. Regardless of the discretion granted by the contract, the posting of artificially depressed prices, like any other act in further-

ance of the alleged anticompetitive behavior, would constitute a breach of good faith. Compliance with the letter of a contract's provisions does not constitute good faith if one's bad faith actions render those provisions invalid or inoperative.

Thus, the same anticompetitive price posting that would violate the antitrust law would also constitute bad faith dealing in violation of the state law duty of good faith imposed by Cal. Com. Code § 1203. The same questions of material fact that we find today regarding the antitrust claims in *City of Long Beach v. Standard Oil Co.* also operate as questions of material fact regarding the elements of breach of duty of good faith. For that reason, the pendent claims considered here must be remanded to the district court along with the antitrust claims remanded in that case.

We note, however, that the plaintiff's antitrust claim and the breach of good faith claim are both predicated on the same conduct of the defendants, the anti-competitive price posting. They also both result in the same harm, underpayment to the City for its oil. On remand, therefore, the district court should take all necessary steps to ensure that the plaintiff is not permitted double recovery for what are essentially two different claims for the same injury. *See, e.g., Foster v. Financial Technology, Inc.*, 517 F.2d 1068, 1072 (9th Cir. 1975).

III. *LONG BEACH II*—THE APPEAL FROM THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT FOR THE DEFENDANTS AFTER REMOVAL FROM STATE COURT.

In February 1986, eleven years after *Long Beach I* began, and eight months after the summary judgment order that disposed of the last portion of the plaintiffs' case in *Long Beach I*, plaintiff State of California filed an action in state court naming the same defendants but alleging causes of action that arose only under state law and covered only the period between 1980 and 1985.

These included: (1) unfair competition and breach of duty to the public trust; (2) breach of two contracts, the Contractor's Agreement at issue in *Long Beach I* and the "LBOD Agreement," a separate operating and drilling contract; (3) breach of the implied covenant of good faith and fair dealing; (4) fraud, deceit, and negligent misrepresentation; (5) three counts of improper operation of intrastate pipelines; (6) violation of state antitrust laws; and (7) violation of state trade laws based upon the other counts.

The defendants removed the action to federal court, where the plaintiffs moved to remand the action to state court. The district court remanded three claims of violations regarding intrastate pipelines to state court, and granted summary judgment in favor of defendants on five claims of unfair competition, breach of contract and good faith, and fraud, leaving two claims to go forward, one for antitrust violation of California's Cartwright Act, and a second derivative from the first, for civil penalties under California's Business and Professions Code. Plaintiffs appeal the retention of federal jurisdiction and the grant of partial summary judgment against them. They contend that all of their claims belong in the state court. We agree that the district court must remand.

Normally a suit may be removed from state court to federal court only if the action could have been filed originally in federal court. 28 U.S.C. §§ 1331, 1441; *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 107 S.Ct. 2425, 2429 (1987). Normally a plaintiff may avoid federal jurisdiction by exclusive reliance on state law. *Id.* However, the "artful pleading doctrine" is sometimes used to recharacterize a plaintiff's complaint when a plaintiff attempts to mischaracterize the nature of his claim as arising under state law when it is actually federal. *See Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2 (1981). "[I]n many contexts plaintiff's claim may be one that is exclusively governed by federal law, so that the plaintiff necessarily is stating a federal

cause of action, whether he chooses to articulate it that way or not." *Sullivan v. First Affiliated Sec., Inc.*, 813 F.2d 1368, 1372 (9th Cir.) (quoting 14A C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3722 at 268-75 (2d ed. 1985)), *cert. denied*, —— U.S. ——, 108 S. Ct. 150 (1987).

In *Sullivan* we observed that the artful pleading doctrine has been used to allow removal where a state claim was filed to circumvent the res judicata impact of a federal judgment. *Id.* at 1376 (discussing *Moitie*). To remedy such a situation the court "can recharacterize a state claim barred by the res judicata effect of a federal judgment as an artfully pleaded federal claim." *Id.; see also Salveson v. Western States Bankcard Ass'n.*, 731 F.2d 1423, 1427-29 (9th Cir. 1984).

The district court in this case believed that such an application of the artful pleading doctrine required denial of remand of plaintiffs' claims to state court even though they did not state any federal causes of action. It saw this case as similar to *Moitie* because it believed its earlier dismissal of the *Long Beach I* claims required dismissal of the state claims on res judicata grounds, and that removal to federal court was needed to protect its earlier federal judgment. It concluded that plaintiffs' complaint was an artful attempt to recast the earlier federal antitrust claims as state claims. The court said:

> It is true that [*Long Beach II*] asserts no federal claim. However, as is noted above, it makes substantially the same antitrust allegation under the Cartwright Act that the plaintiffs charge under the Sherman Act in *Long Beach I*. Having initially cast their action in federal terms, the doctrine of artful pleading prevents the plaintiffs from starting over again with the same claim by resorting to state law in a state court. *See* [*Federated*] *Department Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2 (1981).

The district court's resort to the artful pleading doctrine raises two problems. First, it is unclear whether

the prior federal judgment in this case actually would have operated as a res judicata bar to the state law claims being brought. A judgment covering an earlier time period need not necessarily operate as a res judicata bar to a lawsuit covering a later period even though both suits involve essentially the same course of wrongful conduct. *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322 (1955). Simply alleging the same type of claims against the same defendants for a later period does not guarantee a res judicata bar, because factual matters, such as the conduct of the parties since the first judgment, must be considered.[6] *See id.* at 328; *see also Eichman v. Fotomat Corp.*, 759 F.2d 1434, 1438-39 (9th Cir. 1985) (discussing res judicata doctrine under California law).

Second, our reversal today of the *Long Beach I* judgments undercuts the basis for applying the doctrine. We held in *Sullivan* that the existence of ongoing parallel state and federal suits does not permit removal of the state case under the artful pleading doctrine. There we refused to apply to doctrine and ordered remand of state law claims to state court where parallel lawsuits of state law claims in state court and federal claims in federal court were simultaneously ongoing. We narrowly construed *Moitie* as permitting removal under the doctrine only of "state claims precluded by the res judicata effect of a federal judgment." *Sullivan*, 813 F.2d at 1376. This is a similar situation.

No res judicata preclusion of state law claims occurred in *Sullivan* because the federal action had not yet gone to judgment. Without such preclusion, plaintiff's pleading of state law claims in state court, even if artful, did not "close off defendant's right to a federal forum." *Moitie*, 452 U.S. at 397 n.2 (quoting 14 C. Wright, A. Miller &

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[6] We note that the trial court believed that the two claims were factually identical. Due to our holding, we need not and do not express an opinion on the res judicata effects of the earlier federal judgment.

E. Cooper, *Federal Practice and Procedure* § 3722 at 564-66 (1976)). To allow this type of removal except where a final federal judgment wholly precludes the state court suit would violate "the paramount policies embodied in the well-pleaded complaint rule—that the plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint, and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court." *Caterpillar*, 107 S. Ct. at 2433.

Our action today renders this case squarely within the rule of *Sullivan*. There is no res judicata preclusion arising from the judgment on the *Long Beach I* claims, because we have in this and the accompanying opinion reversed the district court's summary judgment orders on all claims in *Long Beach I*. Our reversal removes any basis for federal court jurisdiction under the artful pleading doctrine. We therefore reverse the district court's entry of judgment and remand in order for the district court, in turn, to remand the removed claims to the state court. The state court is competent to deal with this situation, even if the federal case goes to judgment:

> The res judicata impact of a federal judgment is a question of federal law which a state court is bound to apply under the Supremacy Clause. The state court is competent to apply federal res judicata in the state law suit, and res judicata would be interposed as a defense which ordinarily would not support removal.

Sullivan, 813 F.2d at 1376 (citations omitted). Any issues concerning the priority of the litigation, possible preclusion of issues, and the manner in which the state court action should proceed in relation to the ongoing federal court action in *Long Beach I*, should be considered by the state court.

The judgments are REVERSED AND REMANDED for further action consistent with this opinion.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-5859
D.C. Nos. CV-75-2232-WPG
CV-76-2839

CITY OF LONG BEACH, as trustee for the State of California,
Plaintiff-Appellant,
v.

STANDARD OIL COMPANY OF CALIFORNIA; TEXACO, INCORPORATED; EXXON CORPORATION; UNION OIL COMPANY OF CALIFORNIA; MOBIL OIL CORPORATION; SHELL OIL COMPANY,
Defendants-Appellees.

STATE OF CALIFORNIA, on behalf of itself and all political subdivisions and special districts within the state similarly situated,
Plaintiff-Appellant,
v.

STANDARD OIL CO., *et al.*,
Defendants-Appellees.

No. 86-5860
D.C. No. CV-82-3252-WPG

CITY OF LONG BEACH,
Plaintiff-Appellant,

v.

STANDARD OIL CO., *et al.*,
Defendants-Appellees.

IN RE: COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION—
MDL 150.

Nos. 87-6300/6629
D.C. No. CV-86-1771-WPG

PEOPLE OF THE STATE OF CALIFORNIA; CITY OF LONG BEACH, as Trustee for the State of California, and the State of California as Beneficiary,
Plaintiffs-Appellants,

v.

CHEVRON CORPORATION; UNOCAL CORPORATION; MOBIL OIL CORPORATION; SHELL OIL COMPANY; SHELL CALIFORNIA PRODUCTION, INC.; EXXON CORPORATION; EXXON COMPANY, USA; TEXACO, INC.,
Defendants-Appellees.

Nos. 87-6301/6628
D.C. No. CV-75-2232-WPG

In re: COORDINATED PETROLEUM [sic] PROCEEDINGS IN THE PETROLEUM PRODUCTS ANTITRUST LITIGATION.

CITY OF LONG BEACH, as trustee for the State of California, and the State of California as beneficiary,
Plaintiff-Appellant,

v.

STANDARD OIL COMPANY OF CALIFORNIA, et al.,
Defendants-Appellees.

Filed September 22, 1989

Before: Mary M. Schroeder, Jerome Farris and Cecil F. Poole, Circuit Judges.

ORDER

The opinion filed April 17, 1989, in 86-5859/5860, *Long Beach v. Standard Oil*, is amended by striking the following language at page 3934 of the slip opinion, second full paragraph, lines 5-7: "Unlike *Matsushita*, this is not a case of legitimate price competition or an implausible predatory pricing scheme. *Cf.* 475 U.S. at 588-595." and substituting therefor, "*See Matsuhita*, 475 U.S. at 588-595." With this amendment, the panel has voted to deny appellants' petitions for rehearing and to reject the suggestions for rehearing en banc.

The full court was advised of the amendment to the opinion and the suggestions for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the non-recused active judges in favor of en banc consideration. (Fed. R. App. P. 35.)

The opinion in 86-5859/5860 is amended as set forth above, the petitions for rehearing are denied and the suggestions for rehearing en banc are rejected.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MDL Docket No. 150 WPG

CV 75-2232-WPG
Long Beach

IN RE: COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION

MEMORANDUM OF DECISION

Defendants Mobil and Exxon have moved for partial summary judgment dismissing Count Three of the plaintiff's Second Amended Complaint. These defendants have raised four overlapping arguments in support of their motion, upon which the court has reached conclusions as follows:

1. The qualifying provision in the last paragraph of Article 9(c) of the Contractors' Agreement precludes additional recovery from any of the defendants under the "favored nation" clause of that Article, during the term of a sell-off agreement binding the Field Contractor. Thus, recovery under Count Three is precluded with respect to the period of time from July 1, 1972, to the present.

2. The fact that the plaintiff received ceiling prices from the defendants for the oil allocated to them precludes recovery under the contention that the plaintiff

was paid less than was called for under the contract. This conclusion provides a second reason for denying recovery under count three with respect to the period from October 25, 1973, to October 1, 1976. This conclusion applies only to the breach of contract allegations of the third count, and is without prejudice to any right that the plaintiff may have to recover under its antitrust claims by showing that the May 15, 1973, prices of oil, upon which the ceiling prices were based, were conspiratorially fixed.

3. Even though the plaintiff is a subdivision of the state, a four-year period of limitations is applicable to count three, subject to the determination of factual issues as to whether, and the extent to which, the running of the statute was tolled because of affirmative concealment by the defendants of their three-cut transactions.

4. Obligations upon the plaintiff under the time schedule imposed by Article 9(e) are dependent upon full and complete responses to the plaintiff's request for relevant information. This presents factual questions that are far from resolved in the present state of the record.

It follows from the foregoing that the defendants are entitled to partial summary judgment dismissing count three of the second amended complaint, insofar as it pertains to obligations under the contract occurring on and after July 1, 1972. In all other respects, the motion for summary judgment should be denied.

The remainder of this memorandum contains amplication of the reasons for the above conclusion.

The Effect Of A Sell-Off Contract, Under Article 11. The last paragraph of Article 9(c) states that "[t]he foregoing provisions of this Section 9(c) shall not apply to the Field Contractor during the term of any agreement of sale by the Field Contractor . . . ." The question presented is what portion of the earlier provisions of Article 9(c) would affect the Field Contractor, in the absence of

the qualifying paragraph. Such inquiry clearly brings into focus the statement that ". . . the Value of Oil Allocated to such Contractor [here, the Field Contractor] shall include . . . a further amount . . ." based upon any higher price paid for oil otherwise obtained. The quoted words constitute the "action provisions" of the earlier portion of 9(c), and they clearly pertain to the Field Contractor. Hence, the reference to the Field Contractor in the exemption provision must be considered to remove the effect that the "action provision" otherwise would have upon that same Field Contractor.

In summary, I read Article 9(c) to provide that if the Field Contractor is obligated under a self-off contract, the value of oil allocated to him under the contract is not affected by the favored nation clause. Inasmuch as there will be no "further amount" to be calculated in fixing the value of the oil allocated to the Field Contractor, it follows that there should be no further adjustment in the value of the shares that the Field Contractor distributes to the individual companies that have made outside acquisitions. Thus, the individual companies are deemed to be entitled to the benefit of the exemption provision of Article 9(c) to the same extent as is the Field Contractor.

Under such an interpretation, it is unnecessary to consider whether "Field Contractor" means the defendant companies individually as well as collectively. However, an affirmative answer would provide a second basis for holding the individual defendant companies exempt from the favored nation clause of Article 9(c) during the period of a sell-off agreement by the Field Contractor. For purposes of completeness, this issue, which the parties have argued so thoroughly, is addressed.

The contract contains several indications that the drafting party did not intend "Field Contractor" to apply individually to the defendant companies:

(a) The first sentence of the agreement identifies one of the contracting parties as the "Field Contractor" and states that such entity will be referred to "collectively if more than one person." This, of course, negates the implication that "Field Contractor" means any one of the several companies that comprise it, *individually*.

(b) Article 1(p) carefully defines "Persons Comprising any Contractor" to include the defendant companies, and that term is used in contradistinction to "Field Contractor" several times in the contract.

(c) Article 11(a) lists the Field Contractor and "any of the Persons Comprising Field Contractor" as being two of the entities that are excluded from bidding to obtain oil under sell-off contracts. If the former designation had been intended to pertain to the companies that comprised the latter, individually, there would have been no need for a second designation.

On the other hand, Article 35 states that "[i]f any Contractor shall at any time consist of more than one Person, *all reference to such Contractor in this agreement shall be deemed to refer to each and every of such Person. . . .*" (Emphasis supplied.) The plaintiffs correctly point out that the language that immediately follows the above quoted provision refers to the joint and several liability of each such person. However, the underlined words are categorical, and they are not qualified by anything else in the agreement. The heading of the Article reads "CONTRACTORS MAY CONSIST OF SEVERAL PERSONS," which certainly does not suggest that the textual material is limited to a discussion of the scope of liability.

When the above-mentioned indications that "Field Contractor" is intended not to include the defendant companies, individually, are contrasted with the unqualified statement to the contrary in Article 35, the conclusion seems inescapable that the text of the agreement is am-

biguous on this point. This requires that one look beyond the words of the contract in trying to determine what the parties intended.

There is no doubt that the object of the plaintiff consistently has been to get as high a price as possible for its oil, and I can understand readily the plaintiff's present contention that it would not have been willing to allow the existence of a small sell-off contract to deprive the plaintiff of what might be a substantial increase in its income through operation of the favored nation clause.

However, the defendants respond with comparable plausibility that the City (together with the State) has had full control as to the sizes of the sell-off contracts that could be required (up to 12-½% of the total production); that the imposition upon the Field Contractor of a major sell-off obligation could oblige the individual companies to make outside acquisitions of oil in order to fulfill their own sales commitments; and that such acquisitions might be at increased prices, due, at least in part, to the existence of the sell-off contract. Under such circumstances, it would be unfair for these outside purchases, made necessary at the discretion of the plaintiff, to trigger operation of the favored nation clause. Thus, the plaintiff may have foreseen the necessity, or at least the appropriateness, of foregoing its rights under the favored nation clause during the period of a sell-off contract, in order to induce bidders to be willing to take on the responsibilities of the subject contract which in so many other respects is highly favorable to Long Beach.

In light of the foregoing, I am unable to resolve the textual ambiguity by pointing to a clearly inferable meaning as to the intent of the parties. Under these circumstances, I must resolve this interpretive controversy against the draftsman. This is particularly true inasmuch as the subject document is not the result of negotiation by the parties, but instead was prepared entirely

by the plaintiff and submitted for bid on a "take it or leave it" basis.

Accordingly, for purposes of Article 9(c), the term "Field Contractor" includes each of the defendant companies, individually, thus providing a second reason why the favored nation clause has been inoperative while any sell-off contract has been in effect.

The Fact That The Plaintiff Regularly Received Ceiling Prices. One of the challenges raised by the defendants against the plaintiff's claim in count three that it was underpaid for its oil, is the assertion that the defendants always paid ceiling prices during the entire price control period, from October 23, 1973, to September 30, 1976. The plaintiff acknowledges that this is so, but it contends that the ceiling prices were based upon the posted prices for old oil on May 15, 1973, and that the posted prices on that date were lowered as a result of a conspiracy on the part of the defendants. The plaintiff therefore insists that it is entitled to damages measured by the difference between what the prices actually were on May 15, 1973, and what they would have been but for the defendants' unlawful acts in holding them down.

If the plaintiff can establish these factual allegations, the logic of its claim for damages is thoroughly understandable. The question is whether such a claim is cognizable under the third count, which makes no allegation of collusion in fixing the ceiling prices. I believe that it is not. It is well established that contractual provisions must give way to price regulations, and if the ceiling price was paid, that is the end of the matter, insofar as count three is concerned.

This aspect of the plaintiff's claim for damages in reality is a part of the antitrust action that is asserted elsewhere in the complaint. I am mindful that defendant Richfield has filed a motion for summary judgment on the antitrust claims, "Based Upon Exclusive Jurisdiction Of

Federal Agencies Over Ceiling Prices." I have not yet read the motion papers and have no present opinion on the issues there involved. However, if it comes to pass that this court concludes that its exercise of antitrust jurisdiction would be out of harmony with the congressionally-mandated authority of appropriate federal agencies, it would seem to me to be an *a fortiori* proposition that this court should not interfere with an agency-established price ceiling through enforcement of a contractual provision.

Accordingly, the foregoing conclusion constitutes a further reason why count three should be dismissed, insofar as it pertains to the period of price control, from October 23, 1973, to September 30, 1976.

A Four-Year Statute Of Limitations Applies. Ever since 1872, the California statute of limitations on a contract in writing has been four years. California Code of Civil Procedure § 337. For the same length of time, the four-year limitation has been applicable to actions brought for the benefit of the State. California Code of Civil Procedure § 345.

In 1963, the California Commercial Code was enacted. Section 2107 provides that "[a] contract for the sale of minerals . . . to be removed from realty is a contract for the sale of goods within this division [Division 2] if they are to be severed by the seller. . . ." I agree with the plaintiff that, under the subject agreement, Long Beach, as the "Unit Operator," is the entity that severs the minerals, and that § 2107 is applicable.

The California Commercial Code was based largely upon the Uniform Commercial Code, § 2-725 of which provided that "[a]n action for breach of any contract for sale must be commenced within four years after the cause of action has accrued." This section was omitted from the version of the Commercial Code adopted by the California Legislature in 1963. According to the Cali-

fornia Code Commentary, this omission was in accordance with the recommendation of the State Bar Committee on the Commercial Code, which suggested that such a provision was unnecessary in light of C.C.P. § 337, which provided a four-year period for written contracts, and § 339, with its two-year period, for oral contracts. Thus, when the subject agreement was executed, in 1965, the controlling statute was Code of Civil Procedure § 337.

However, in 1967, § 2-725 of the Uniform Commercial Code, which had been omitted from the California Commercial Code, was adopted without change and became the present § 2725. According to the California Code Commentary, this was done because of the desirability of eliminating jurisdictional variations and establishing on a nationwide scale the four-year period covering all contracts for sale.

Thus, since 1967, the statute applicable to the subject agreement has been the four-year period established by California Commercial Code § 2725, instead of the four-year period prescribed by Code of Civil Procedure § 337.

The plaintiff points out that there is no specific enactment making § 2725 applicable to actions brought on behalf of the State, in the manner that C.C.P. § 345 controls state actions covered by C.C.P. § 337. The plaintiff therefore contends that no statute limits the time for bringing this action on behalf of the State, because the Legislature has not waived its immunity against being bound by California Commercial Code § 2725. I am not able to accept such an argument.

The policy of the State under which it agreed to be bound by a four-year statute of limitations covering actions upon written contracts, has been in effect since 1872, with the enactment of C.C.P. § 345. In light of the above-mentioned statutory history, there is no basis to infer that the Legislature intended the later adoption of a § 2725 to abrogate such policy. The four-year limita-

tion contained in that statute accordingly is adjudged to be applicable to this action.

However, the running of this statute of limitations may be tolled to the extent that the defendants may be shown to have concealed from the plaintiff the facts upon which the third count is based. Such a contention, which is made and denied, raises factual questions that prevent the granting of summary judgment on the basis of the statute of limitations.

The Plaintiff's Article 9(c) Obligations Were Dependent Upon Timely Receipt Of All Relevant Information. The principal issues raised by count three are whether the three-cut transactions among the defendants resulted in acquisitions that triggered the favored nation provisions of Article 9(c), and if so, whether the defendants failed to account to the City for such acquisitions. The defendants have stated that for purposes of their present summary judgment motion the court may assume affirmative answers to both of these issues. See, Memorandum of Points and Authorities in Support of Motion of Mobil Oil Corporation and Exxon Corporation for Partial Summary Judgment, filed March 7, 1978, pages 21 and 22.

The defendants' position appears to be: that they had no obligation to furnish information except "upon request"; that the City had no right to oblige them "to *furnish all* documentation which bears upon the value of the oil allocated," (see, Defendants' Reply Memorandum, filed July 14, 1978, page 13; emphasis in original); and that, to the contrary, the only information that could properly be required of the defendants is specified in Article 9(d) 1 and 2, all of which was supplied.

The obvious purpose of Article 9(d) was to enable the City to make certain that the oil allocated to the Field Contractor was properly valued under the provisions of Article 9(c). It was drawn to allow the plaintiff access to all information pertinent to such valuation, and it appears that it did cover all of such information other than

that pertaining to three-cut transactions. The City insists that, at the time of such drafting, it had no knowledge whatever of the three-cut process, which it now contends, and the defendants concede for purposes here concerned, would have an effect upon its oil valuation. In light of such concession, the defendants must be considered to have been aware that the plaintiff would be interested in all information pertaining to the three-cut transactions, and, even though not specifically demanded, it should have been supplied in response to requests by the plaintiff for Article 9(d) information.

The defendants assert that the plaintiff had much earlier and more detailed knowledge concerning the three-cut transactions than it now acknowledges, and that, in any event, they did furnish all information that the plaintiff ultimately requested. The plaintiff joins issues on these contentions, and affidavits and copies of communications have been submitted that give support to each side.

This court is obliged to conclude that there are factual questions as to whether, and the extent to which, the defendants concealed from the plaintiff their three-cut transactions the time at which the plaintiff was sufficiently put on notice to oblige it to demand specific information concerning such transactions; and whether or not, and when, full information was supplied. Until these questions are resolved, I am unable to find that the plaintiff's rights under Article 9(e) lapsed as to all calculations made prior to January 1, 1973. It follows that I cannot grant summary judgment based upon an account stated, which necessarily is dependent upon a mutual understanding as to the facts upon which the purported statement of account is based.

Nothing in this memorandum is meant to imply that this court is convinced that full disclosure of facts regarding the three-cut transactions will result in additional recovery by the plaintiff. The fact that some barrels in a particular exchange may be given a higher

value, because of the three-cut analysis, than the values accorded under Article 9(b), would not, of itself, be a basis for recovery. The significant question would be the average value per barrel accorded to the shipment concerned. I am still of the view that my apple tree example is relevant. The plaintiff is not entitled to recover for all of its apples the values allocable to those of the highest quality.

In light of the conclusion announced earlier in this memorandum, the period before July 1, 1972, is the only time with which we any longer are concerned. Perhaps the parties will share my apprehension of the likelihood that expensive discovery and analysis of the three-cut transactions that occurred during that period will result in the total values accorded averaging out pretty close to the 9(b) values, and that any additional recovery would be less than the expense involved in establishing the right to it.

This memorandum is based upon the assumption that the only alleged misdeeds on the part of the defendants are their failure to account for their three-cut transactions and make payment accordingly, as required by the favored nation provisions of Article 9(c). The plaintiff points out that its complaint charges such violations "among other things." However, its responses to the defendants' summary judgment motion fail to disclose any "other things" that would affect the above analysis.

A separate document will be filed contemporaneously herewith granting summary judgment in favor of all defendants with respect to all claims under count three occurring after June 30, 1972. In the event that either party might wish to appeal from such partial summary judgment, I shall certify it for interlocutory appeal under 28 U.S.C. § 1292(b).

DATED: November 21, 1978.

/s/ William P. Gray
WILLIAM P. GRAY
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

IN RE: COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION

MDL Docket No. 150 WPG

CV 75-2232-WPG
Long Beach

[Filed Nov. 22, 1978]

PARTIAL SUMMARY JUDGMENT

Defendants Mobil and Exxon have moved for partial summary judgment dismissing Count Three of the Second Amended Complaint in this action. For reasons set out in the Memorandum of Decision filed contemporaneously herewith, IT IS ADJUDGED THAT

Count Three is ordered dismissed with respect to claims accruing after June 30, 1972.

Pursuant to 28 U.S.C. § 1292(b), the Court expresses its opinion that this order "involves a controlling question of law as to which there is substantial ground for differences of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."

Dated: November 21, 1978

/s/ William P. Gray
WILLIAM P. GRAY
United States District
Court Judge

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MDL Docket No. 150-WPG

CV 75-2232-WPG
(Long Beach)

IN RE: COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION

[Filed Feb. 6, 1979]

MEMORANDUM TO COUNSEL AND ORDER

Plaintiff Long Beach has moved that the Summary Judgment signed by the court on November 21, 1978, be altered; defendants Mobil and Exxon have filed opposition to such motion; and defendants Union, Shell, Socal and Atlantic Richfield have moved for summary judgment or judgment on the pleadings as to Count III, all of which the plaintiff opposes. This Memorandum is concerned with the issues raised in such motions.

I. THE SCOPE OF COUNT III

In my Memorandum of November 21, 1978, at page 13, I expressed the assumption that in Count III ". . . the only alleged misdeeds on the part of the defendants are their failure to account for their three-cut transactions

and make payment accordingly, as required by the favorded nation provisions of Article 9(c)". The plaintiff urges that I reconsider that assessment, and I have done so, particularly inasmuch as Mobil and Exxon, in their motion, did originate the bold assumption that Count III concerns only Article 9(c), which the plaintiff consistently has strenuously denied.

If paragraph 34 of the Second Amended Complaint were to be read without considering the phrase, "among other things," it seems reasonably clear that it alleges no more than a 9(c) violation. It accuses the respective defendants of having acquired oil in the field at higher consideration than was calculated under 9(b) and of having failed to pay the "further amount" required by 9(c). However, the plaintiff has pointed to its description of "among other things" contained in its answer to contention interrogatory No. 38 (see page 5 of the plaintiff's memorandum dated May 26, 1978). Under our system of notice pleading, I am prepared to rule that such answer does put the defendants on notice as to what the "other things" are that the plaintiff charges against them. However, I still have considerable difficulty in understanding how such answer creates a significant issue that goes beyond Article 9(c).

Answer No. 38 gives a bill of particulars containing four items:

1. The alleged breach of Article 9(d) does not help us much here. A violation of either 9(b) or 9(c) would, in itself, be a violation of the obligation to submit "A current and accurate list of all purchases and sales of oil . . . ." Thus, a 9(d) allegation does not serve to expand the scope of Count III beyond 9(c).

2. I interpret this allegation to mean that the defendants have not posted their prices of oil according to the true value of such oil ". . . as evidenced by the internal and three-cut values of the defendants." If this is so, I

can readily understand how it would constitute a violation of the implicit obligation that any prices that are posted be posted in good faith. This is particularly true inasmuch as posted prices are taken into consideration in order to determine the prices that the defendants must pay for the oil allocated to them.

However, if the three-cut transactions result in a defendant paying for oil more than the posted price, it seems to me that this would be reflected in "[t]he weighted average of the Prices Paid by Substantial Purchasers . . . ," which, under 9(b)3 and 4 would overcome the effect of such understanding in 9(b)1 and 2. Also, of course, it would trigger, where appropriate, the operation of the favored nation clause of 9(c).

It may be that my problem is that I do not yet have an adequate understanding of the manner in which prices are posted, the extent (if any) of the obligation upon the defendants to post prices, and the significance to the plaintiff of the posting of less than full prices, in light of Article 9(b)3 and 4. Further oral argument will be invited on this issue.

3. Item 3 of the bill of particulars accuses the defendants of having "conspiratorially depressed the prices for heavy crude in violation of the antitrust laws." This appears to be the gravamen of the allegation in paragraph 18(a) of the First Cause of Action and therefore is not needed in Count III.

4. The alleged violation of Article 4(a)(1)(a) would follow automatically from a violation of 9(b) or 9(c). This item in the bill of particulars adds nothing to the Count III allegation that would require consideration beyond 9(c).

II. THE AMBIGUITY IN ARTICLE 9(c)

California Civil Code § 1654, relied upon by the plaintiff, provides that if the text of a written contract is uncertain as to its meaning, its language ". . . should be

interpreted most strongly against the party who caused the uncertainty to exist." In the present case, this detailed, complicated and self-serving contract was prepared by the plaintiff and put out for bid. Under these circumstances, we do not need the help of the presumption contained in the second sentence of the statute in order to determine where responsibility for the textual uncertainty lies. This conclusion is in harmony with the rationale expressed by the Ninth Circuit in the footnote to its opinion in *Department of Water and Power v. Okonite-Callender Cable Co., Inc.*, 181 F.2d 375, 380 (1950), which took the position that the statutory presumption in favor of the public body had been rebutted by the showing that the City prepared the specifications.

In each of the cases upon which the plaintiff relies, the court made its own interpretation of the contract in a manner that favored the governmental body and then cited § 1654 as a "makeweight." *See, Berger v. Sequoia Union High School District*, 139 C.A. 2d 364 (1st Dist. 1956) and *Johnston v. Joint Highway District*, 138 C.A. 450 (3d Dist. 1934). Those decisions hardly are compelling authority requiring that all ambiguity in this contract be resolved in favor of the party that created it, and I am not willing to do so.

III. CORRECTION OF DESIGNATION OF "FIELD CONTRACTORS"

Of course, the exemption from the favored nation provisions of Article 9(c) applies only to the defendant companies that come within the definition of "Field Contractor" pursuant to the analysis contained in my Memorandum of November 21, 1978. The contemplated superseding Judgment will exclude defendants Socal and Atlantic Richfield as beneficiaries of such exemption.

IV. THE PERIOD OF THE PRICE CEILING

The contemplated superseding Judgment will deny recovery against all defendants with respect to the period covered by ceiling prices, October 25, 1973 through September 30, 1976, with the exception of the 308,468 barrels produced in March 1974.

V. THE STATUTE OF LIMITATIONS

The briefing that followed my Memorandum of November 21, 1978, has resulted in my reexamination of the earlier briefing pertaining to the summary judgment motion by Mobil and Exxon, as well as the Second Amended Complaint. It is true, as the defendants contend, that the last-mentioned document makes no allegation concerning fraudulent concealment. The arguments in the briefs relevant to the statute of limitations focused entirely upon which statute applied and whether application of Commercial Code § 2725 would bind a governmental subdivision of the State. At no time did the plaintiff go beyond its contention that no statute of limitations applies and argue that, in any event, the running of any period of limitations would have been tolled by fraudulent concealment.

It now appears to the court that the first suggestion of "concealment" in the context of a statute of limitations is found in my Memorandum of November 21, 1978, in the closing paragraph pertaining to this subject (page 10, lines 11-16). Upon further reflection, I believe that such comments were inappropriate and that they stemmed from my having allowed my conclusions concerning the Article 9(e) issue improperly to affect the separate but somewhat related matter of the statute of limitations.

It is now adjudged that, under the present state of the pleadings and the interlocutory position of this litigation, the matter of the tolling of the four-year statute of limi-

tations is not in issue. It is also determined that the injection of such an issue at this time, more than two and one-half years after the initial complaint was filed, is not warranted, in light of the potential prejudice to the defendants and the inherently increased expense and difficulty of discovery.

The contemplated superseding Judgment will deny recovery against all defendants with respect to all transactions occurring prior to June 27, 1971.

For reasons hereinabove indicated, the Partial Summary Judgment dated November 21, 1978, is withdrawn. It will be superseded by a Partial Summary Judgment that will be prepared by the court and filed following the further hearing suggested herein concerning the Scope of Count III.

Liaison counsel are requested to arrange with the clerk for a mutually convenient date for the further hearing on any Monday afternoon at 2:00 p.m. prior to April 29, 1979.

DATED: February 6, 1979.

/s/ William P. Gray
WILLIAM P. GRAY
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MDL Docket No. 150 WPG

CV 75-2232-WPG
Long Beach

IN RE: COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION

[Filed Apr. 26, 1979]

MEMORANDUM OF DECISION

In my memorandum to counsel of February 6, 1979, I agreed to reconsider the earlier conclusion that in Count III of the Complaint, ". . . the only alleged misdeeds on the part of the defendants are their failure to account for their three-cut transactions and make payment accordingly, as required by the favored nation provisions of Article 9(c)." As a result, further oral argument was held on March 9, 1979, and additional briefs have been received concerning whether plaintiff Long Beach's "good faith" contention can survive the defendants' motions for summary judgment. The "good faith" claim is, in effect, that the "posting" defendants, in violation of their "good faith" obligations, posted prices at less than the true value of the oil, and that the non-posting defendants frustrated

the purposes of the Contractor's Agreement by adopting these artificially depressed prices."

Being convinced, at long last, that I have an adequate understanding of the positions of the parties and the significant provisions of the Contractor's Agreement, it is concluded that the plaintiff cannot sustain such claim and that the defendants' motions for summary judgment with respect to such claim must be granted.

Insofar as Count III is concerned, the actions of the defendants must be considered individually; if there was a conspiracy to depress prices through non-posting or artificially low posting, such conduct would be covered by the antitrust claims of Counts I and II. This was acknowledged by Mr. Blecher at the March 9 hearing (Transcript, page 78).

As the plaintiff points out, under the Contractor's Agreement, each defendant contractor had the "opportunity" to establish its own posted price for oil. However, I can find nothing in the Agreement that imposes upon such contractor an obligation to do so. A posting is designed to represent the price that the poster is willing to pay for oil. A company may post a low price if it is not particularly concerned with whether or not it receives any response thereto, but realizing at the same time that it will make a greater profit if the low posting results in a purchase. On the other hand, if a contractor needs additional oil in order to keep its refinery operating at the desired efficiency, it may post a price high enough to insure that it will attract a seller. Thus, the contractor may elect to post a low price or a high price or not post at all, in accordance with its business judgment, and I can find nothing in the contract or in principles of fairness that would justify supplementing this discretion with the views of the plaintiff or of the court as to what a true market price should be.

The plaintiff points out that "[T]he concepts of 'market value' or 'market price' are routinely applied by

courts in breach of contract cases." (Long Beach Memorandum of March 23, 1979, page 5). This is true, and the transcript submitted as an exhibit to Texaco's Memorandum (April 12, 1979) shows clearly that the State Lands Commission was aware of such a possibility, among the many others that it considered as it sought to establish a method of pricing the oil to be produced from the Wilmington field. In the course of that hearing, Mr. Alan Sieroty, Executive Secretary to the Lieutenant Governor, asked a representative of one of the major oil companies if he had any objection to using "fair market value or current market value" instead of posted prices. The latter responded:

> "[Fair market value is] a legally enforceable standard and, therefore, from a purely legal point of view there would be no objection to that standard; but from a practical businessman's standard, he cannot be assured how that standard will be applied from time to time and how the level of price determined under that standard will really relate to what the oil industry believes is the value of oil and, therefore, that kind of standard—unless it were very clearly spelled out in its details, and so on—would create the kind of uncertainty which I think would result in a very substantial discounting of the bid." (Transcript, page 38).

It is evident that the drafters of the contract moved away from "fair market value" in establishing the pricing formula, perhaps in order to avoid the risk of ". . . a very substantial discounting of the bid." Having done so, the plaintiff is hardly in a position now to impose upon the defendants that same uncertain standard.

With respect to the non-posters, I can see no basis for the plaintiff's contention that they somehow were obliged to post because "[t]hroughout the country, it is invariable industry practice for a continuing purchaser of crude oil for its refinery to post prices." (Long Beach Memo-

randum of March 23, 1979, page 3). Certainly, it cannot be said that such practice was invariable, because, according to the affidavits submitted by Exxon, Shell and Texaco, those companies were not posting at the time the contract was executed in 1965. It is scarcely conceivable that the plaintiff was not aware of this at that time.* As is indicated above, there is nothing in the agreement that requires any contracting party to post prices, whether or not this would constitute a change in its prior practice.

The defendants impliedly attribute to the plaintiff the contention that the non-posters somehow were obliged to insist that the posters get their prices up to an adequate level. I do not find that the plaintiff's argument goes that far, and the inherent antitrust violation that would be implicit in such conduct is obvious.

In view of the foregoing, the superseding Summary Judgment that will be filed contemporaneously herewith will dismiss the so-called "good faith" claims of Count III, leaving only the allegations of violations of Article 9(c).

DATED: April 26, 1979.

/s/ William P. Gray
WILLIAM P. GRAY
United States District Judge

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* In any event, at the hearing before the State Lands Commission on June 24, 1964, reference was made to the four major oil companies that post in the Wilmington oil field as being Socal, Mobil, Richfield and Union. (Transcript, page 37).

APPENDIX G

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MDL Docket No. 150 WPG

CV 75-2232-WPG (Long Beach)

IN RE: COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION

[Filed Jun. 14, 1979]

MEMORANDUM TO COUNSEL

My Memorandum of Decision of April 26, 1979, was issued prior to my receipt, on April 27, 1979, of plaintiff Long Beach's Reply Memorandum On The "Good Faith" Obligation Of Non-Posting Defendants (inasmuch as I was unaware of any agreement by counsel to extend the time therefor). As soon as the plaintiff's memorandum came to my attention, I withheld filing the Partial Summary Judgment that I had prepared, and I have given further consideration to the matter in light of the plaintiff's memorandum and defendant Socal's Memorandum In Opposition filed May 14, 1979.

Despite the plaintiff's more extended argument, I am still of the view that a particular defendant, acting alone, cannot be held culpable if it refrains from posting prices or if it posts lower than what is later considered by a seller or a court to have been less than market value.

It is an entirely different matter if the defendants have conspired to hold down the posted prices and thus hold down the purchase prices under the agreement. The thrust of the plaintiff's memorandum is that this is exactly what occurred and that the defendants then exchange the oil among themselves on the basis of its "true value" by means of the three cut program. As we have discussed before, this would appear to be a violation of the antitrust laws. Such conduct would be actionable under Counts I and II.

An amended Parital Summary Judgment that will implement the Memorandum of Decision of April 26, 1979, is being filed and distributed contemporaneously with this Memorandum.

DATED: June 14, 1979.

/s/ William P. Gray
WILLIAM P. GRAY
United States District Judge

APPENDIX H

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MDL Docket No. 150 WPG

CV 75-2232-WPG
Long Beach

IN RE: COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION

[Filed Jun. 14, 1979]

AMENDED PARTIAL SUMMARY JUDGMENT

Defendants Mobil, Exxon, Union, Shell, Socal and Atlantic Richfield have moved for partial summary judgment dismissing Count III of the Second Amended Complaint in this action. For reasons set out in the Memorandum of Decision dated November 21, 1978, the Memorandum to Counsel dated February 6, 1979, the Memorandum of Decision dated April 26, 1979, and the Memorandum to Counsel filed contemporaneously herewith,

IT IS NOW ORDERED AND ADJUDGED AS FOLLOWS:

1. The Partial Summary Judgment signed by this court on November 21, 1978, is withdrawn and this Judgment shall be entered in its place.

2. Summary judgment is granted to the moving defendants with respect to Count III as follows:

(a) As against all moving defendants other than Socal and Atlantic Richfield, all claims based upon alleged violations of Article 9(c) of the Contractor's Agreement are dismissed except as to those transactions occurring between June 27, 1971, and June 30, 1972.

(b) As to defendants Socal and Atlantic Richfield, the claims based upon alleged violations of Article 9(c) of the Contractor's Agreement are adjudged as follows:

(i) Those occurring before June 27, 1971, are dismissed by reason of the running of the four-year statute of limitations.

(ii) Those occurring between June 27, 1971, and October 25, 1973, are not dismissed, defendants' motions for summary judgment being denied.

(iii) Those occuring between October 25, 1973, and September 30, 1976, are dismissed except those that are based upon sales that were below ceiling prices or are based upon the 308,468 barrels of oil produced in March 1974 that were not subject to price ceilings.

(iv) Those occurring after September 30, 1976, are not dismissed.

(c) All other claims and asserted bases for relief in Count III are dismissed in their entirety.

3. Pursuant to 28 U.S.C. § 1292(b), the court expresses its opinion that this order "involves a controlling question of law as to which there is substantial ground for difference of opiñion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."

DATED: June 14, 1979.

/s/ William P. Gray
WILLIAM P. GRAY
United States District Judge

APPENDIX I

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil Action No. 85-2023-WPG

THE CITY OF LONG BEACH, as Trustee of the State of California and THE STATE OF CALIFORNIA as Beneficiary,
Plaintiffs.

vs.

CHEVRON CORPORATION; TEXACO INC.; EXXON CORPORATION; EXXON USA; UNOCAL CORPORATION; MOBIL OIL CORPORATION; SHELL OIL COMPANY; SHELL CALIFORNIA PRODUCTION, INC., and DOES 1 through 3, Inclusive,
Defendants.

[Filed Jul 3, 1985]

MEMORANDUM OF DECISION
(DENYING MOTION FOR REMAND)

On December 18, 1975, the City of Long Beach and the State of California filed in this court a Second Amended Complaint principally charging the defendants, including all of the oil companies that are defendants in the present action, with conspiracy to hold down the prices of crude oil that they paid to the plaintiffs (Case No. 75-2232-WPG, hereafter Long Beach I). On March 4, 1985, the same plaintiffs filed the present action in the Los Angeles County Superior Court, principally charging the present defendants with conspiracy to hold down the prices of crude oil that they paid to the plaintiffs (Long Beach II). The defendants promptly caused Long Beach

II to be removed to this court and the plaintiffs have moved that it be remanded to the court of California from which it came. Such motion has been thoroughly briefed and was argued on June 24, 1985. The motion to remand now is denied.

The complaints in Long Beach I and Long Beach II are identical in substance, with two exceptions:

(a) Long Beach I charges that the alleged conspiracy was in violation of the United States antitrust laws, namely Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2) (Count One), and also in violation of California's antitrust laws, Sections 16,700-16,758 of the Business and Professions Code (the Cartwright Act) (Count Two). Long Beach II makes no mention of *Sherman* and its antitrust allegations are based upon *Cartwright* alone.

(b) Each of the complaints *asserts* that the alleged conspiracy began ". . . at a time, the precise date of which is unknown to plaintiffs" and continued ". . . up to and including the date of this complaint. . . ." (Long Beach I, paragraph 18; *see* Long Beach II, paragraph 22.) Thus, a comparison of the two filing dates shows that the alleged conduct in Long Beach II extended almost ten years beyond that of Long Beach I.

As is asserted above, in all other respects the allegations of the two complaints are substantially the same. Count Three of Long Beach I charges that the defendants' failure to pay the "full value" of the oil allocated to them was in violation of the Contractors' Agreement that the parties had executed. The same allegations in more expansive and imaginative ways are found in the second through eighth causes of action in Long Beach II.

During the past ten years, several motions have been made, briefed and argued in Long Beach I and have been decided by this court. Some of these decisions would curtail substantially the ability of the plaintiffs to recover,

even asuming that they can prove the conspiracy that they allege. These decisions included interpretations of the Contractors' Agreement, and the effects of federal price ceilings and of the federal Entitlements Program upon this litigation. Also, there are currently under submission additional issues that could further limit the prospects or the amount of the plaintiffs' recovery. Examples of the latter are the manner of use by the defendants of their individually owned pipelines, and the affect upon this litigation of the government's Mandatory Oil Import Program. The complaint in Long Beach II makes no mention of any of these matters in its allegations or its requests for relief, being drafted, instead, as though such issues had never been raised.

It is obvious that things have not been going well for the plaintiffs in Long Beach I, and I readily can understand their desire to start all over again in another court. From a reading of the complaint in Long Beach II, it would appear that this is exactly what they are trying to do. However, if a plaintiff initially files his claim in federal court under the Sherman Act, he may not later bring the same action in state court in reliance upon the state antitrust laws and thereby escape federal jurisdiction to the prejudice and detriment of the defendant. This is the doctrine of "artful pleading", announced by the Supreme Court in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 397 fn. 2 (1981) and applied in *Salveson v. Western States Bankcard Ass'n*, 731 F.2d 1423 (9th Cir. 1984), affirming Judge Schwarzer's opinion in 526 F. Supp. 566 (N.D. Cal. 1981).

At the oral argument on the motion to remand, counsel for the plaintiffs asserted that Long Beach II ". . . is not simply a rehash of the federal case. It is not an attempt to go behind this court's rulings on the conduct occurring before December 31, 1977 [the end of the damage period asserted in Long Beach I]. What it is is an attempt to discover and prove that since December 31, 1977, the de-

fendants have engaged in violations of the Cartwright Act and in other state claims which are alleged in plaintiffs' state court action [Long Beach II]." (Transcript, page 18). The same point is made in their brief. However, as is discussed above, the complaint in Long Beach II makes no pretense of focusing on conduct or damages occuring after December 31, 1977. On the contrary, it undertakes to reach just as far back into the past as does Long Beach I. It is true, as the plaintiffs point out, that the four-year statute of limitations may be applied to this case and thus exclude from consideration events and damages occurring prior to 1981. However, the statute of limitations may be applied only when it is raised as a defense, and resourceful plaintiffs have been known to cause the application of the statute to be pushed back substantially upon a showing of concealment on the part of the defendants.

If I were able to conclude that Long Beach II is designed to involve conduct and/or damages occuring only after December 31, 1977, the end of the Long Beach I damage period, I would have no trouble in deciding to remand it. As the plaintiffs point out, in granting their earlier request for permission to file a supplemental complaint updating their claim in Long Beach I from June 27, 1975 (the date of the original complaint) to December 31, 1977, I said that the plaintiffs would have had a right ". . . to file a new action to cover claims based upon the later transactions . . . ." (Memorandum of Decision and Order filed September 14, 1979.) This is in accord with the decision of the Supreme Court in *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955), upon which the plaintiffs rely. It is true that in *Lawlor* the new action was filed in the same federal district court as was the original action. However, being thoroughly mindful of the ". . . well established rule that plaintiff is master of his claim, and may choose what law to rely on," (*Salveson v. Western States Bankcard Ass'n*, 525 F. Supp. 566, 571 (N.D. Cal. 1981), I believe that if

such plaintiff chooses to file his *new* claim in state court under the Cartwright Act, he may do so. Under such circumstances, and in the absence of diversity, a federal court would lack jurisdiction. This would be true even if the original claim had been filed in federal court under the Sherman Act.

The test here for removal is whether or not the new action asserts a new claim. This must be determined by an examination of the new complaint. *Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149 (1908). And it is from an examination of the complaint that the court must determine whether a plaintiff has, by "artful pleading", sought to deprive the federal court of jurisdiction to the detriment of the defendant. *See Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2 (1981); *Salveson v. Western States Bankcard Ass'n*, 525 F. Supp. 566, 572 (N.D. Cal. 1981).

As is discussed above, my examination of the complaint in Long Beach II compels the conclusion that it does invoke an "artful pleading" attempt to reassert the plaintiffs' original federal claim. Accordingly, the motion to remand is denied.

DATED: July 3, 1985.

/s/ William P. Gray
WILLIAM P. GRAY
United States District Judge

APPENDIX J

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil No. 86-1771-WPG

THE PEOPLE OF THE STATE OF CALIFORNIA, THE CITY OF LONG BEACH as Trustee for the State of California, and THE STATE OF CALIFORNIA as Beneficiary,

Plaintiffs,

v.

CHEVRON CORPORATION; UNOCAL CORPORATION; MOBIL OIL CORPORATION; SHELL OIL COMPANY; SHELL CALIFORNIA PRODUCTION, INC.; TEXACO, INC.; EXXON CORPORATION; EXXON COMPANY, U.S.A.; and DOES 1 through 10, Inclusive,

Defendants.

[Filed May 29, 1986]

MEMORANDUM OF DECISION DENYING PLAINTIFFS' MOTION TO REMAND

The plaintiffs filed this action in the Superior Court of the State of California for the County of Los Angeles. The defendants caused it to be removed here, and the plaintiffs have moved that it be remanded to the State Court. Such motion has been thoroughly briefed, was argued on April 28, 1986, and submitted for decision. It now is denied.*

* This decision is contrary to the tentative conclusion that I stated orally at the outset of the hearing, which illustrates the value of oral argument and the opportunity for more careful reflection.

The plaintiffs assert five reasons why the case should be remanded:

A. New Time Period

B. No Federal Claim

C. New Plaintiff And Exclusive State Claims

D. Different State Standards Of Liability

E. Important California Interests And Polices Are Involved.

I shall discuss each of these items and indicate why I believe that they do not warrant the requested action.

A. *New Time Period.*

In the original action by Long Beach and the State of California (MDL No. 150-WPG; CV 75-2232-WPG) ("Long Beach I"), the claims are expressly limited to the period ending December 31, 1977; the present action ("Long Beach III") seeks damages for the time period 1980 through 1985. The plaintiffs remind me that in my Memorandum of Decision of July 3, 1985 (denying remand of a subsequently filed case ("Long Beach II")), I said that "[i]f I were able to conclude that Long Beach II is designed to involve conduct and/or damages occurring only after December 31, 1977, the end of the Long Beach I damage period, I would have no trouble in deciding to remand it." Such expression was made in reliance upon *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955), from which we learn that even though a plaintiff had lost an earlier suit, he would be entitled to bring a new action against the same defendant, based upon new acts done after the initial litigation was completed. The opinion by Chief Justice Warren pointed out that the defendants were alleged to have committed several antitrust violations since the earlier suit, such as tie-in sales and deliberately slow deliveries.

Accordingly, the issue here is whether the defendants are accused in the present complaint of any actions that have not been the subject of litigation in Long Beach I for the past ten years. An examination of the complaint reveals nothing new. Long Beach I accuses the defendants of an antitrust conspiracy to hold down the prices of crude oil that they paid to Long Beach, in violation of the Sherman Act (15 U.S.C. § 1). The Ninth Cause of Action in the present complaint asserts the same claim of antitrust conspiracy to be in violation of the Cartwright Act (California Business & Professions Code §§ 16750-16761).

Long Beach I charges that the defendants have violated the Contractors' Agreement that they entered into with Long Beach by purchasing oil at posted prices that were less than fair market value. In the present complaint, the First, Second, Third, Fourth, Fifth and Tenth Causes of Action make the same allegations in somewhat versatile and imaginative ways.

In Long Beach I, the plaintiffs complain about the manner in which the defendants use their proprietary pipelines to forestall access of others to Long Beach's oil at the wellhead. The Sixth, Seventh and Eighth Causes of Action in Long Beach III accuse the defendants of unfair and unlawful use of their pipelines and seek to have such pipelines adjudged to be public utilities.

From the foregoing it seems evident that Long Beach III is charging the defendants with the *same* conspiracy and the *same* violations of the Contractors' Agreement that long have been at issue in Long Beach I. This court has granted summary judgment to the defendants on the conspiracy aspect of Long Beach I and now has under submission the plaintiffs' request for reconsideration of its decision granting summary judgment on the principal contract issues. I readily can understand the desire of the plaintiffs to try for better success at the hands of a different court with respect to the years 1980 to

1985. However, in the absence of a showing that the defendants have done something different in the latter period that would warrant relief, the principles of artful pleading and of *res judicata* or collateral estoppel forestall such opportunity. *Salveson v. Western States Bankcard Ass'n*, 731 F.2d 1423 (9th Cir. 1984), affirming 525 F. Supp. 566 (N.D. Cal. 1981); *Exhibitors Poster Exchange Inc. v. National Screen Service Corp.*, 517 F.2d 110 (5th Cir. 1975). The last cited case asserted that "[c]ollateral estoppel bars a plaintiff from assailing the defendants for proceeding without change upon a course of conduct previously held lawful against plaintiff's identical attack." 517 F.2d at 114.

B. *No Federal Claim.*

It is true that Long Beach III asserts no federal claim. However, as is noted above, it makes substantially the same antitrust allegation under the Cartwright Act that the plaintiffs charge under the Sherman Act in Long Beach I. Having initially cast their action in federal terms, the doctrine of artful pleading prevents the plaintiffs from starting over again with the same claim by resorting to state law in a state court. *See Federal* [sic] *Department Stores, Inc. v. Moitie*, 452 U.S. 394, 397 n.2 (1981).

C. *New Plaintiff And Exclusive State Claims.*

The First, Sixth and Tenth Causes of Action in Long Beach III seek civil penalties and other relief under § 17200 of the California Business & Professions Code on behalf of a new plaintiff, "The People of the State of California." As is discussed above, these causes of action involve the same alleged fraudulent business practices that are asserted in different ways in Long Beach I.

The plaintiffs at the outset readily could have chosen the California statute as a means of obtaining damages from the defendants. However, they elected instead a

federal forum for their claims in Long Beach I, and this court has adjudged the practices concerned not to be fraudulent. As is discussed in paragraph A, above, the plaintiffs are not entitled to litigate again the same claims in the state court.

D. *Different State Standards Of Liability.*

The plaintiffs assert that "[w]hile this Court has found that a conspiracy must be shown to establish a violation of the federal Sherman Act in Long Beach I, proof of conspiracy is not necessary to establish violations of California's unfair competition statutes and other state law claims in Long Beach II. Actions individually taken by defendants can be unlawful under the state statutes and state law violations alleged." The plaintiffs also say that this case should be remanded because of a "presumption favoring state's rights to litigate in its courts." (Opening Brief, page 5).

Once again, the plaintiffs could have taken these points into consideration in determining which forum to choose for their suit against the defendants. Having chosen this one, the doctrine of artful pleading prevents them from beginning again in another forum.

E. *Important California Interests And Policies Are Involved.*

The plaintiffs point to the great interest that California has in contracts involving the sales of large quantities of its oil and in the manner in which intrastate oil pipelines are operated. The plaintiffs suggest that these factors require that this action be in state court. The answer is the same: These very same considerations were relevant when the plaintiffs elected to bring Long Beach I in this court.

In light of all of the foregoing, it is evident that the only substantial difference between Long Beach I and

Long Beach III is the fact that the period of the former ends in 1977 and the latter begins as of January 1, 1980. The issues, most of which have been adjudged, are the same and the resulting decisions are as applicable to one period as to the other. It is much too late to burden the parties and another court with this litigation.

The motion to remand to the Los Angeles County Superior Court accordingly is denied.

DATED: May 29, 1986.

/s/ William P. Gray
WILLIAM P. GRAY
United States District Judge

APPENDIX K

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MDL Docket No. 150 WPG

CV 75-2232-WPG
Long Beach

IN RE: COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION

[Filed Jul 24, 1986]

MEMORANDUM OF DECISION

The defendants' motion for summary judgment on the plaintiffs' contract claims under Article 9(c) of the Contractors' Agreement, and the plaintiffs' motion for reconsideration of this court's dismissal of the "good faith" claims of Count III were argued on May 12, 13 and 22, 1986, and submitted for decision. The court now determines as follows:

1. The defendants' motion regarding 9(c) is denied, except the separate motion of Exxon for dismissal of the 9(c) claim, which is granted.

2. Having given reconsideration to the plaintiffs' motion regarding their "good faith" claims, the court reaffirms its dismissal thereof, for the reasons set out in its Memorandum of April 26, 1979.

I. THE ARTICLE 9(c) CLAIMS.

A. *9(e), As Drawn, Does Create a Condition Precedent to Recovery Under 9(c).*

1. The terms of 9(e) provide that within nine months following the end of the calendar year concerned, Long Beach "*shall* review and, if necessary adjust" the values of the oil allocated under 9(b) and 9(c) "for the purpose of determining whether any Contractor is required to account for any further Value of Oil Allocated to such Contractor." (Underlining supplied.) Under 9(e), a Contractor or the State may require Long Beach to make such review and any necessary adjustment within such nine months period. It seems to me that the mandatory nature of the review and adjustment means that, by the time the nine months period expires, there shall have been an account stated, as far as Long Beach is concerned. In the absence of a further demand, the Contractor should be able to consider the preceding year's transactions finally settled and close its books on the matter.

The plaintiffs insist that the procedure set out in 9(e) simply gives Long Beach the right to require the Contractor to make immediate payment of any further obligations that may be disclosed by the review and adjustment. Thus, according to the plaintiffs, the failure to make demand within the nine months period would not foreclose Long Beach's right to sue for any deficiency. It would mean only that Long Beach would not be able to obtain any disputed additional sums in advance of any ensuing litigation.

2. However, if the purpose of 9(e) had been simply to give Long Beach the option of getting the claimed additional money at the outset, the use of the word "may," rather than "shall," clearly would have been indicated. As I have determined before, Long Beach prepared the Contractors' Agreement. To the extent that there may be an ambiguity in its terms, the interpretation must be

resolved against the plaintiffs. (See my Memorandum of Decision dated November 21, 1978, page 6.)

3. The above interpretation of 9(e) is somewhat reinforced by contemporary comments of responsible representatives of Long Beach and of the State Lands Commission expressing their awareness that the City was obliged to conclude its review within the prescribed nine months period in order to be able to require a Contractor to account for any further value of oil under 9(c). (See Exhibits 34 and 7 of the Exhibits to the defendants' points and authorities filed October 27, 1982.)

B. *Whether the Defendants' Withholding of Information Pertinent to 9(c) Excuses the Plaintiffs' Failure to Act Under 9(e) Is a Question of Fact.*

1. On November 21, 1978, I issued a Memorandum of Decision that constituted an earlier denial of the defendants' motion for summary judgment on the contract claims. A paragraph on page 12 thereof reads as follows:

> "This court is obliged to conclude that there are factual questions as to whether, and the extent to which, the defendants concealed from the plaintiff their three-cut transactions; the time at which the plaintiff was sufficiently put on notice to oblige it to demand specific information concerning such transactions; and whether or not, and when, full information was supplied. Until these questions are resolved, I am unable to find that the plaintiff's rights under Article 9(e) lapsed as to all calculations made prior to January 1, 1973. It follows that I cannot grant summary judgment based upon an account stated, which necessarily is dependent upon a mutual understanding as to the facts upon which the purported statement of account is based."

After thorough study of the briefs and the transcript of the oral argument, and after considerable pondering, I have been forced again to the same conclusion.

2. There is much to be said for the defendants' contention that the plaintiffs' failure to make timely review and demand under 9(e) should preclude their right to any 9(c) recovery. DeGolyer and MacNaughton reminded Long Beach by letter on March 1, 1967, that its review of prices received for crude oil produced from the Wilmington Field should include an examination of exchanges of such oil. Long Beach took substantially no action in response to this reminder. The nine months following 1970 passed without a request for information of any kind, and the request for 1971 was sent on September 26, 1972, four days before the expiration of the prescribed period, which was acknowledged to be too late to expect a timely response. It was not until March 12, 1973, that any demand for exchange information was made. In response thereto, the defendants disclosed to the plaintiffs many exchange agreements which the latter's technical representatives analyzed and discussed with responsible employees of the defendants. The plaintiffs' officials concluded from such examination and discussions that the defendants' exchanges formed no basis for additional claims under 9(c). These officials continued to adhere to this view and later found no basis for the contention of a legislative committee headed by then Assemblyman Corey, to the effect that "major oil companies are using crude oil exchange agreements to hide prices they pay each other for crude oil, prices far higher than they pay the State for the same crude oil." (Exhibit 83 to Thompson Deposition, 9/25/74.)

As a result of all of the foregoing, no demand for additional payment pursuant to Article 9(c) was ever made either before or after this action was filed on June 27, 1975.

The foregoing is believed to constitute substantial support for a conclusion that the 9(c) claims should be dismissed because of the absence of a timely adjustment and demand under 9(e).

3. However, 9(e) provides that the review and the adjustment required of the plaintiffs shall be made "on the basis of all available relevant and reliable information." The plaintiffs contend that the defendants withheld and concealed from them much information about the use by the defendants of exchanges under their three-cut programs and the extent to which the defendants considered such exchanges to give to Wilmington crude oil higher values than did posted prices.

Harold A. Lingle was a Deputy City Attorney for Long Beach and was largely responsible for the drafting of the Contractors' Agreement. In an affidavit filed in opposition to the defendants' motion for summary judgment, Mr. Lingle said that at the time of such drafting he "had not heard of the existence of the three-cut exchanges and did not know that the oil companies maintained valuation data for cuts or that they entered into cut settlements involving cash or refined products." (Pages 6 and 7.)

The defendants have submitted deposition testimony of Mr. Lingle that might be considered to raise a question as to when he did become aware of the three-cut exchanges. In any event, on August 1, 1973, Mr. Lingle wrote a memorandum to the director of the Long Beach Oil Properties in which he said that he recently had received information that would appear "to open up all sorts of avenues of investigation as to whether or not they [the defendants] were receiving other crudes which sell at a higher price in exchange for equivalent amounts of Wilmington Crude, and if so, I believe that there could be a strong argument for us to be paid more money under the Contractors' Agreement." He recommended

prompt investigation. (Exhibit 28, Plaintiffs' Opposition to Defendants' Summary Judgment Motion.)

The defendants point out that Article 9(d) provides that they are required to furnish information concerning their relevant purchases and sales of oil only upon request, and that the defendants did furnish or permit examination of whatever documents were requested. At an earlier hearing on this issue on September 1, 1978, I said: "It is one thing to say that the state or Long Beach is permitted to look at the books and pertinent records, but if they don't know they exist because they haven't been informed of them or they are not furnished, it is pretty hard to blame Long Beach for not looking at those remaining pertinent records." (Transcript page 274.)

If the plaintiffs did fail to seek in a timely manner all information pertinent to the three-cut exchanges because the defendants concealed or failed to reveal the existence of such information, Article 9(e) should not be used to forestall any recovery to which 9(c) might otherwise entitle them. After considering all of the evidence supplied, I still am obliged to conclude that these issues must be resolved by the trier of fact.

C. *On the Merits of 9(c), Whether and the Extent to Which the Defendants Exchanged Oil Among Themselves at Prices Higher Than Those Posted, Constitute Factual Questions.*

1. This court is aware that, under 9(c), a defendant owes additional sums to the plaintiffs only if it has acquired oil by purchase or exchange at a higher price than it paid under 9(b). The defendants insist and argue at length that the plaintiffs can make no such showing. I cannot conclude as a matter of law that this is so. Without undertaking to discuss all of the defendants' contentions, I will set out below some of the reasons for my conclusions.

(a) The plaintiffs refer to many instances in which reasonable representatives of the defendants have made assertions to the effect that three-cut exchanges provide "a pricing basis more nearly reflecting the actual value of the crude." (Plaintiffs' Trial Brief, ¶ 3.95. See also ¶¶ 3.97-3.117.) Such statements suggest strongly that the defendants, in exchanging crude oil among themselves on a three-cut basis, may have given such oil a higher value than they gave it in purchases pursuant to posted prices. The value ascribed to oil received in an exchange constitutes the *price* paid for such oil and thus renders Article 9(c) relevant.

(b) A trier of fact could find that the defendants did mutually give to oil that they exchanged a higher value than they gave to oil that they bought at posted prices. An even exchange of quantities of crude oil for mutual convenience, with no reference to value, would hardly indicate the transaction to be based upon a price higher than posted prices, or based upon any price whatever. However, once the parties mutually put a monetary value upon the oil exchanged, such asserted value *is the price* at which the exchange is made. The record shows that monetary values were placed upon each of the three cuts in exchange transactions. Once this is done, and the percentages of each of the three cuts that make up a barrel of crude oil are determined or interpolated, the monetary value of such barrel can easily be computed. The plaintiffs have done this and, in the instances shown, the resulting figures are higher than posted prices. (See Plaintiffs' Pretrial Brief, ¶¶ 5.551.) Although the proof remains to be established. I do not see how the plaintiffs' analysis can be faulted.

The plaintiffs also present evidence tending to show that the defendants, in their exchanges, equated cut one with gasoline, cut two with stove oil, and cut three with specifically identified heavy oil. (NERA Report, Appendix 5; Volume I, Tab 12, plaintiffs' exhibits presented

at the May 12, 1986, hearing.) Here again, with a bit of interpolation and arithmetic, a monetary value can be put upon a barrel of crude oil exchanged.

(c) In my Memorandum to Counsel of April 14, 1986, I said that the plaintiffs may not establish the monetary value of the oil exchanged by the defendants "by referring to refining values or the market value of the products." The defendants have reminded me of this comment several times in the course of their arguments. I still believe it to be true that the plaintiffs may not establish the value in any such manner. However, to the extent that the *defendants* mutually used refining values or product prices in ascribing values to oil in order to settle exchange imbalances, the plaintiffs are entitled to use such values in making claims under 9(c).

(d) Under 9(c), a defendant that received exchanged oil at a higher price than posted prices was obliged to pay the difference to the plaintiffs for each day that such oil was received into its tanks. The defendants contend that the plaintiffs have not made such comparisons on a day to day basis. It appears likely that the difficulty in doing so has been created largely by the manner in which the defendants kept accounts concerning the exchanges and by the infrequency of the settlements. To the extent that this is so, the plaintiffs may not be prejudiced. The price given to oil exchanged on a particular day may be interpolated to the extent necessary and the resulting figures compared with posted prices on such day.

(e) The defendants contend that for an exchange adjustment to give any indication of "price" paid, the same party must be the creditor with respect to all three cuts. The defendants point to exchange 665, which adjusted "purchases" by Union of cut one and cut three from Mobil and a purchase by Mobil from Union of cut two. The letter from Union to Mobil that formed the basis for the settlement puts a monetary value on the

balance due with respect to each of the three purchases, with the result that Mobil was to receive from Union about $135,000. (See Exhibit 12 submitted in support of the Defendants' Motion for Summary Judgment.) The defendants undertake to make the point that the valuations placed upon the respective purchases are unimportant so long as Mobil received from Union $135,000, which is the difference in the *comparative* values. However, the parties put a dollar value on each of the cuts. Once again, the plaintiffs are entitled to use those same dollar values in interpolating the respective percentages of a barrel of oil that each of the three cuts constituted, and thus become able to attribute monetary value to the barrels of oil that made up each of the three exchanges.

(f) In paragraph 8.32 of their pretrial brief, the plaintiffs assert that the amount of damages claimed in their breach of contract action is based upon the NERA Study's conclusions with respect to the values of the crude oil exchanged among the defendants. NERA derived these conclusions from what it found to be the refinery values of such oil. The defendants contend that this is the only manner in which the plaintiffs have asserted that they intend to show damages; that the court previously has ruled that such a manner of proving damages is foreclosed to the plaintiffs; that the court also has ruled that the plaintiffs' proof will be limited to what they allege in their pretrial brief; and that therefore the plaintiffs should not be allowed to prove any damages.

I find the defendants' contention to be too restrictive as to how the plaintiffs have asserted their claim for damages. Section VI of Chapter 5 of the plaintiffs' pretrial brief is head: "*The Values Assigned to Crudes in the Context of Settlements of 3-Cut Exchanges Demonstrates That Heavy Crudes Were Undervalued.*" The text that follows spells out the actions of the defendants that justify that heading. As is discussed above, if the plaintiffs can establish what they contend, they are entitled to prevail.

D. *The Potential Period For Recovery.*

1. *The price control ceiling.* The phase I ceiling was "the highest price at which a seller delivered or furnished . . . [crude oil] to purchasers in a substantial number of transactions during the base period." (§ 3(a), Economic Stabilization Regulation No. 1, Fed. Reg. 16515 (August 21, 1971)). The phase II and phase III ceilings stemmed from the same formula. Reassessment of the arguments and authorities submitted by the parties has caused this court to conclude that such ceiling was not limited to the posted prices, which admittedly were paid. Rather, the ceiling was the highest price that any defendant paid to anyone, through exchange or otherwise, during the base period, and thus was obliged to pay to the plaintiffs in light of 9(c). I find the analogy to *United States v. Jefferson Parish School Board*, 333 F. Supp. 418 (E.D. La. 1971) to be appropriate and the reasoning in that decision persuasive. Of course, 9(c) would not affect the ceiling unless there were a substantial number of 9(c) exchanges during the base period, from July 15 to August 14, 1971. Thus, sales relevant to 9(c) would have to constitute at least ten percent of the sales during such period in order to affect the price ceiling.

This court is aware that on July 19, 1984, it settled findings of fact that recited that the plaintiffs received ceiling prices for their crude oil throughout phases I, II and III of price controls. (See findings numbered 7, 25 and 39.) Although such findings were prepared and submitted by the defendants, the plaintiffs made no specific objection thereto. In fact, until recently, they tacitly acknowledged having been paid ceiling prices. I believe that their first contention that posted prices did not form the price control ceilings appeared in their memorandum filed May 7, 1986.

However, the lateness of the plaintiffs' present contention, which I find valid, may be due to the fact that this case has been litigated piecemeal. The subject of price

controls has been considered in the contexts of whether the plaintiffs were exempt therefrom or in relation to the antitrust action, but until the current motions we have not focused upon whether or not 9(c) would have any effect upon such controls. Under these circumstances, I believe that I have the authority to allow the "afterthought" here concerned, and have determined to do so.

2. Depending upon the ability of the plaintiffs to show that 9(c) transactions occurred during the base period, from July 15 to August 14, 1971, that involved prices higher than posted prices, it now appears that the periods of potential liability are:

(a) For the THUMS defendants: June 27, 1971 (the beginning of the allowable period within the statute of limitations) to June 30, 1972 (the beginning of the period of "sell-offs").

(b) For defendant Socal: From June 27, 1971, to December 31, 1977 (the end of the damage period). If I have missed something here, counsel are invited to remind me. Otherwise, the Amended Partial Summary Judgment of June 14, 1979, will be modified accordingly.

E. *Exxon Had No 9(c) Exchanges During the Period of Potential Recovery and Therefore Has No Liability Under 9(c).*

Exxon did not receive any Wilmington crude oil by three-cut exchange during the period of potential liability (June 27, 1971, through June 30, 1972). It therefore urges that any 9(c) contract claims against it should be dismissed, and has moved accordingly. The plaintiffs oppose, contending that the Contractors' Agreement provides that any additional sum payable pursuant to 9(c) shall be charged to the Contractor, which was THUMS, and that the defendants are jointly and severally responsible for all obligations of the Contractor.

There is much to be said for the plaintiffs' present interpretation of the Contractors' Agreement. However, in their pretrial brief (paragraph 7.16), the plaintiffs assert:

> "Each defendant which acquired Wilmington crude oil in the Field through the three-cut exchange during the period 1970 through 1977, obtained Wilmington crude oil at a price in excess of posted prices. *Those companies* owe added monies to Long Beach, pursuant to Article 9(c)." (Underlining supplied.)

Likewise, in their Response in Opposition to Defendants' Motion for Summary Judgment on Count Three (The Contract Claim), the plaintiffs assert that they "are entitled to have the higher price of any Wilmington crude acquired by *a defendant* applied to all Wilmington crude allocated to *that defendant* on that same day." (Underlining supplied) (page 10). The same interpretation was expressed by the Office of the California Attorney General, which advised the State Lands Commission that "added value can be applied only to the company which acquires Wilmington crude oil in exchange for more highly valued crude oil, in the event such *company failed to make a settlement* for the higher value delivered." (Page 6, Exhibit 9 to Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment on Count Three (The Contract Claim)). (Underlining supplied.) The foregoing comments express the view that the additional payment required under 9(c) is the obligation of the entity that received the crude oil at higher than posted prices, and not the obligation of THUMS. Thus, under the plaintiffs' longstanding interpretation, Exxon has been and is entitled to rely upon the fact that it had no 9(c) acquisitions as a full answer to any contract claim based upon that provision. Accordingly, the 9(c) claim against Exxon will be dismissed.

II. REGARDING THE "GOOD FAITH" OBLIGATIONS UNDER THE CONTRACTORS' AGREEMENT.

Following the hearing on this matter, I have reread the briefs and have studied the transcript of the oral arguments. I also have examined again the Memorandum of Decision of April 26, 1979, in which I initially rejected the plaintiffs' "good faith" claims, as well as my Memorandum to Counsel of April 14, 1986. Having done so, I find that there has been nothing in the subsequent arguments that has changed the views that are set forth in those memoranda. I find also that I still cannot state my conclusions better than they are there expressed. The dismissal of the plaintiffs' "good faith" claims is accordingly reaffirmed.

III. "WHERE DO WE GO FROM HERE?"

A. The antitrust claims and the "good faith" claims having been dismissed, all that remains to be tried are the claims under 9(c). Thus, the only factual issues remaining are whether the failure of the plaintiffs to perform promptly under 9(e) precludes recovery, and whether, and the extent to which, the defendants owe money to the plaintiffs under 9(c). If these matters must be litigated, they should be litigated promptly in order that final judgment may be rendered. The present status is that the defendants have not yet submitted their pretrial brief and, of course, there has been no pretrial conference.

It occurs to the court that the factual positions of the parties have been revealed thoroughly, and that a defendants' pretrial brief and a pretrial conference on this issue may not be needed. Under 9(c), it appears that the plaintiffs will be obliged to show the exchange prices at which crude oil was received by the respective defendants and to compare such prices with the then current purchases under posted prices. The effect, if any, that 9(c) acquisitions during the base period may have had

upon ceiling prices will also have to be resolved. I have no feel as to how difficult these tasks will be; how long preparation for trial will take; what help, if any, the plaintiffs may properly need from the defendants; or how much money may be involved in these issues. Accordingly, I am wondering whether or not we could eliminate, or at least greatly curtail, the defendants' pretrial brief regarding 9(c) and set the case for early trial, perhaps in the fall of this year. Discussion among the parties and comments are invited.

B. Unless the plaintiffs successfully appeal the antitrust dismissals, the extent of any prospective recovery is reduced greatly. On the other hand, the defendants have what may be a considerable exposure under 9(c), plus the substantial possibility that the Court of Appeals will disagree with one or more aspects of my rulings against the plaintiffs. These circumstances, plus the obvious fact that preparation for trial and trial will add greatly to the expense of litigation that already has been extremely costly, suggest strongly the desirability of settlement. I would welcome the opportunity to participate in settlement negotiations or would be glad to get one of my colleagues to give assistance.

DATED: July 24, 1986.

/s/ William P. Gray
WILLIAM P. GRAY
United States District Judge

APPENDIX L

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MDL NO. 150-WPG

CV 86-1771-WPG
(Long Beach III)

IN RE: COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION

[Filed Apr. 13, 1987]

MEMORANDUM OF DECISION

On May 29, 1986, this court filed a Memorandum of Decision denying the plaintiffs' motion to remand this case to the Los Angeles County Superior Court. Subsequently, the defendants moved to dismiss the action entirely, and the plaintiffs have moved that my refusal to remand be certified for interlocutory appeal, pursuant to 28 U.S.C. § 1292(b). The plaintiffs also have requested that the court reconsider its order denying remand. These issues have been thoroughly briefed and were orally argued on January 13, 1987.

Upon giving further consideration to the matter, I have modified somewhat the position expressed in the Memorandum of May 29, 1986, and I now have determined to take the following action, subject to the considerations expressed at the end of this Memorandum.

1. THE FIRST, SECOND, THIRD, FOURTH, FIFTH AND TENTH CAUSES OF ACTION WILL BE DISMISSED.

In Long Beach I the plaintiffs charged that the defendants purchased oil from Long Beach at posted prices that were less than what the plaintiffs asserted to have been fair market value. This is the "good faith" claim that was thoroughly considered and rejected as a matter of law in my Memorandum of Decision of April 26, 1979. As I said in my Memorandum of May 29, 1986, "[i]n the present complaint, the First, Second, Third, Fourth, Fifth and Tenth Causes of Action make the same allegations in somewhat versatile and imaginative ways."

Of course, the time period covered in the present action is different from that concerned in Long Beach I, but, unlike the situation in *Travelers Indemnity Co. v. Sarkisian*, 794 F.2d 754 (2d Cir. 1986), the alleged acts are the same and so is the issue. Having initially raised such issue in this court and lost, the doctrine of collateral estoppel precludes the plaintiffs from trying again in a different tribunal.

> "Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation."

Montana v. United States, 440 U.S. 147, 153 (1979). The holding of the court was squarely in accord with the quoted statement.

2. THE SIXTH, SEVENTH AND EIGHTH CAUSES OF ACTION SHOULD BE REMANDED TO THE STATE COURT.

The principal contention of these Causes of Action is that the defendants, other than Exxon, have been operating their pipelines as private carriers under circum-

stances that, under California law, should require them to serve the public as common carriers. The plaintiffs claim that if the defendants were obliged to be common carriers, the plaintiffs would be able to sell their oil at higher prices than those currently posted by the defendants.

In Long Beach I, the plaintiffs charged the defendants with having conspired to operate their pipelines in furtherance of their three-cut exchanges. We did have a mini-hearing on this and other matters on July 28, 1983, and on March 23, 1984, I filed a Memorandum to Counsel. In that Memorandum, I set out some tentative views "in order to enhance the value of oral argument" at the formal hearing, which was then set for April 25 and 26, 1984. I also asserted the tentative conclusions that the plaintiffs had not established the alleged conspiracy with respect to the defendants' operations of their pipelines and that the defendants probably would be entitled to summary judgment.

I believe that nowhere in Long Beach I was the contention made that the defendants' pipelines should be deemed to be public utilities; but even if I am mistaken in my recollection, there certainly was no adjudication on such a subject.

Under the foregoing circumstances, I believe that there is no basis for collateral estoppel, and if the plaintiffs now want to contend in state court that the defendants' pipelines should be adjudged to be common carriers, they should be entitled so to do. Any other determination would forever preclude the State of California or Long Beach from raising this issue, which involves important public policy that should be given careful judicial consideration by the courts of the state.

3. REGARDING THE NINTH CAUSE OF ACTION.

Paragraph 119 alleges combinations in violation of the Cartwright Act in the respective subparagraphs, as follows:

(a) This subparagraph aserts the same contentions with respect to the defendants' pipelines that are made in the Sixth, Seventh and Eighth Causes of Action, but casts them in terms of alleged unlawful "combinations". The issue contained in this subparagraph should be remanded, along with those Causes of Action.

(b) This subparagraph is only a restatement of the First Cause of Action. It also will be dismissed.

(c) This subparagraph refers to the defendants' exchange transactions, and accuses the defendants of conspiring to use such exchanges as a means of dealing with the oil among themselves at its true value and concealing such evaluations from the plaintiffs. These allegations are very close to the Article 9(c) issues that remain to be litigated in Long Beach I. Inasmuch as they pertain to a later time, the plaintiffs may elect to try them in state court rather than here. Insofar as the "combination" allegations are concerned, the plaintiffs are entitled to undertake to show in state court how the defendants approached and dealt with any exchange matters during the period covered by this action. In remanding this issue, I would commend to the California court that discovery be carefully limited to such period.

(d) This subparagraph contends that the defendants "have combined to limit the availability of crude oils to independent refiners in order to discipline said refiners and cause them to exit the market in order to facilitate defendants' control over the prices of plaintiffs' and other independent producers' crude oils." In my Memorandum of March 23, 1984, I adverted to this general contention and drew the tentative conclusion that "the plaintiffs have not shown enough facts to overcome the defendants' motions for summary judgment on this issue." Here again, no decision was made, collateral estoppel does not apply, and remand therefore is indicated. However, there was ample opportunity for discovery on this issue in Long Beach I, and here, also, I would commend to the state

court that further discovery be limited to post January 1, 1980 conduct.

I am temporarily withholding entering an Order implementing the foregoing decisions pending further discussion with counsel. As is indicated above, the only issues that I am disposed to remand are the matters involving the pipelines (Causes of Action Six, Seven and Eight, and paragraph 119(d) of the Ninth Cause of Action), and the exchanges that would involve Article 9(c).

It appears evident that the defendants would prefer to have a final appealable judgment from this court rather than be sent back to the state court on these limited issues. The thought also has occurred that the plaintiffs might have a similar desire, because:

(a) I am wondering how enthusiastic the plaintiffs are about concentrating now on their common carrier issues. In light of *Richfield Oil Corp. v. Public Utilities Commission*, 54 C.2d 419 (1960), it would appear unlikely that the California Supreme Court would find "dedication" of the pipeline to have occurred, or would otherwise grant relief in the absence of legislation.

(b) The plaintiffs might be disposed to try here the "exchange" issues involved in Long Beach III, along with those that I am obliged to consider in Long Beach I.

I am also concerned about the defendants' assertion that my contemplated remand order would not be appealable.

Under the foregoing circumstances, it may be that counsel would conclude that a practicable solution would be for me to deny entirely the remand, dismiss the common carrier issues, try the 119(c) exchange issues, and give both sides a final judgment from which to appeal.

From the foregoing it should be evident that I want to make formal disposition of this litigation in the manner most satisfactory to the parties, and I would welcome

counsel's views accordingly. I will be available in Boston during April for a telephone conference if this is deemed satisfactory, or I would be glad to have a hearing in Boston if this is preferable, inasmuch as some counsel are located on the east coast. If the matter can wait until May, I will be regularly available, or if an earlier hearing in Los Angeles is deemed necessary, I could arrange to return to accomplish it on April 22. Liaison counsel are requested to confer and inform the court as to their desires concerning these matters.

DATED: April 6, 1987.

/s/ William P. Gray
WILLIAM P. GRAY
United States District Judge

APPENDIX M

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MDL-150-WPG

CV 86-1771-WPG
(Long Beach III)

THE PEOPLE OF THE STATE OF CALIFORNIA, THE CITY OF LONG BEACH as Trustee for the State of California, and THE STATE OF CALIFORNIA as Beneficiary,
Plaintiffs,

v.

CHEVRON CORPORATION; UNOCAL CORPORATION; MOBIL OIL CORPORATION; SHELL OIL COMPANY; SHELL CALIFORNIA PRODUCTION, INC.; TEXACO, INC.; EXXON CORPORATION; EXXON COMPANY, U.S.A., and DOES 1 THROUGH 10, Inclusive,
Defendants.

[Filed May 27, 1987]

MEMORANDUM OF DECISION ON RECONSIDERATION OF PLAINTIFFS' REQUEST FOR REMAND

The plaintiffs' motion to remand this case has given me a lot of concern, as counsel must thoroughly be aware from my memoranda filed May 29, 1986, and April 13, 1987, and the oral argument on May 18, 1987. I have

given further study to the matter and now take the action set forth in this memorandum. The fact that such action is not altogether consistent with my prior expressions of intention is illustrative of the difficulty that I have had in resolving these important issues.

Inasmuch as all of the arguments and authorities are well known to counsel, I shall refrain from discussing them at length and announce my conclusions and intentions in somewhat telegraphic form.

1. *This Court Does Have Jurisdiction Over This Case (Long Beach III) Following Removal.* The plaintiffs filed Long Beach I in this court; a major contention in such action involved the "good faith" obligation to post and pay in accordance with fair market value. After thorough consideration, this court granted partial summary judgment to the defendants dismissing the "good faith" claim.

At the request of the plaintiffs, I have reread (actually restudied) the first five causes of action of the present complaint (Long Beach III) and remain convinced that their basic thrust is the same "fair market value" contention that was raised in Long Beach I and dismissed. Under the foregoing circumstances and the principle of "artful pleading," the "good faith" claim in Long Beach III remains a federal claim and, upon removal, this court acquired jurisdiction over it.

2. *The First, Second, Third, Fourth And Fifth Causes Of Action Will Be Dismissed Under the Principle Of Collateral Estoppel.* Despite the differences in the time periods concerned, the legal basis upon which the prior dismissal was founded applies equally to the present litigation. Collateral estoppel prevents the plaintiffs from litigating this "good faith" issue again. Thus, the motion to remand must be denied and the five causes of action asserting such issue dismissed. *Salveson v. Western States Bankcard Association*, 731 F.2d 1423 (9th Cir. 1984).

3. *This Court Has Jurisdiction Over The Remaining Causes Of Action.* "This is so because once the federal

court acquires jurisdiction of a case on removal, it also acquires jurisdiction over pendent state law claims, whether or not the federal claim proves out." *Salveson v. Western States Bankcard Association*, 731 F.2d 1423, 1430 (9th Cir. 1984).

4. *The Court Now Determines, In Its Discretion, To Exercise Its Jurisdiction Over The Remaining Claims In The Following Manner:*

(a) *The Sixth, Seventh And Eighth Causes Of Action Will Be Remanded To The State Court.* I reaffirm the reasons for this action that are set out in section "2" of my memorandum filed April 13, 1987.

(b) *The Motion To Remand The Ninth Cause Of Action Will Be Denied Without Prejudice.* The plaintiffs are entitled to discovery in order that it may be determined whether or not they can show evidence of acts constituting the alleged violations of the Cartwright Act having occurred since December 31, 1979. Such discovery should be carefully controlled in order to avoid the burden on the parties that "replowing the same field" would involve. It would be relatively difficult for a new judge to exercise such control, and I therefore believe that this court should undertake this responsibility. According, I shall retain jurisdiction and supervise discovery. If it appears therefrom that there is enough evidence of post-1979 conduct to warrant trial, I shall remand the Ninth cause of action to the state court. If not, I shall dismiss it with prejudice.

5. *The Tenth Cause Of Action Will Be Disposed Of As Indicated Below.* This cause of action alleges that the actions by the defendants described in the earlier causes of action constituted unfair business practices in one form or another in violation of sections 17202-17206 of the California Business and Professions Code. Accordingly:

(a) To whatever extent such allegations apply to the first five causes of action, they will be dismissed.

(b) To whatever extent such allegations apply to the Sixth, Seventh and Eighth causes of action, they will be remanded, along with those causes of action.

(c) To whatever extent such allegations apply to the Ninth cause of action, they will be combined with that cause of action and treated in like manner.

6. *The Plaintiffs' Request For Permission To Add A Cause Of Action Claiming 9(c) Violations Occurring After December 31, 1979, Will Be Granted.*

(a) As I have said before, the plaintiffs are entitled to litigate in state court any challenged conduct by the defendants occurring after the end of the Long Beach I damage period (see my Memorandum of Decision of July 3, 1985).

(b) The defendants raise the question as to the extent to which "sell off contracts" would interfere with the plaintiffs' rights under 9(c). This is a matter that should be determined before remand.

(c) Accordingly, I shall retain the plaintiffs' proposed new cause of action under 9(c) and allow appropriate discovery. If it thereafter appears that 9(c) may be involved despite any sell off contracts, I shall remand such cause of action to the state court, under the assumption that it had been implicit in the complaint in Long Beach III. If discovery discloses no valid factual basis for such a claim, I shall dismiss the cause of action.

DATED: May 27, 1987.

/s/ William P. Gray
WILLIAM P. GRAY
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MDL-150-WPG

CV 86-1771-WPG
(Long Beach III)

THE PEOPLE OF THE STATE OF CALIFORNIA, THE CITY OF LONG BEACH as Trustee for the State of California, and THE STATE OF CALIFORNIA as Beneficiary,
Plaintiffs,

v.

CHEVRON CORPORATION; UNOCAL CORPORATION; MOBIL OIL CORPORATION; SHELL OIL COMPANY; SHELL CALIFORNIA PRODUCTION, INC.; TEXACO, INC.; EXXON CORPORATION; EXXON COMPANY, U.S.A., and DOES 1 THROUGH 10, Inclusive,
Defendants.

[Filed May 27, 1987]

ORDER DISPOSING OF PLAINTIFFS' MOTION TO REMAND TO STATE COURT

In accordance with the "Memorandum of Decision on Reconsideration of Plaintiffs' Request For Remand" issued by this court on this date.

IT IS ADJUDGED AS FOLLOWS:

1. The plaintiffs' motion to remand causes of action One, Two, Three, Four and Five is denied and those causes of action are dismissed with prejudice pursuant to the defendants' motion.

2. The plaintiffs' motion to remand causes of action Six, Seven and Eight is granted and those causes of action are remanded accordingly to the state court.

3. The plaintiffs' motion to remand the Ninth cause of action is denied, this court electing to retain jurisdiction.

4. The allegations of the Tenth cause of action will be combined with the other causes of action to which they pertain and disposed of in like manner.

5. This order does not apply to defendant Texaco, Inc. As of April 12, 1987, these proceedings are automatically stayed as to Texaco as a result of Texaco's status as a petitioner under Chapter 11, Section 301 of the Bankruptcy Code. 11 U.S.C. § 362(a) (1982 & Supp. III 1985).

DATED: May 27, 1987.

/s/ William P. Gray
WILLIAM P. GRAY
United States District Judge

APPENDIX N

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

MDL Docket No. 150-WPG

Long Beach

CV 75-2232 WPG

IN RE: COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION

[Filed Jul. 30, 1987]

FINAL JUDGMENT TO FEDERAL RULE OF CIVIL PROCEDURE 54(b)

This Court, having heard the defendants' motion for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, on the "good faith" posting claim of Count III, having granted that motion in its Memorandum of Decision filed April 26, 1979, and having expressly determined that there is no just reason for delay and expressly directed the entry of final judgment thereon pursuant to Rule 54(b) of the Federal Rules of Civil Procedure,

IT IS HEREBY ORDERED AND ADJUDGED that plaintiff, the City of Long Beach, take nothing with respect to the good faith posting claim decided on April 26, 1979, as against defendants Exxon Corporation, Mobil

Oil Corporation, Shell Oil Company, Standard Oil Company of California (now named Chevron Corporation) and Union Oil Company of California, and that such claim be dismissed on the merits and with prejudice. This judgment does not apply to the remaining claims in this case and the conduct upon which they are based involving alleged breach of Articles 9(c) and 9(e) of the Contract.

DATED: July 27, 1987

/s/ William P. Gray
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA

MDL Docket No. 150-WPG

Long Beach
CV 75-2232 WPG

IN RE: COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION

[Filed Jul. 27, 1987]

ORDER REGARDING FINAL JUDGMENT
PURSUANT TO FEDERAL RULE OF
CIVIL PROCEDURE 54(b)

This Court, having dismissed the so-called "good faith" posting claim of Count III in its Memorandum of Decision filed April 26, 1979, and having reaffirmed that dismissal by denying plaintiff's motion for reconsideration thereof in the Court's Memorandum of Decision entered July 29, 1986, now finds as follows:

The aforementioned dismissal effectively concludes litigation in this Court on some but not all claims presented in this action. In the unusual circumstances of this case and the related case known as *Long Beach III* (CV 86-1771-WPG), policies favoring efficient judicial administration will be served by entering judgment pursuant to Fed. R. Civ. P. 54(b) as to the plaintiff's claim of breach of an alleged implied good faith obligation concerning

posting. Appeals that are ripe in *Long Beach III* would address the question whether the adjudication of the "good faith" posting claim in this proceeding collaterally estops assertion of certain claims in *Long Beach III*.

The good faith posting claim involves a legal issue that is distinct from the remaining claims in this case, and the conduct upon which they are based, involving alleged breach of Articles 9(c) and 9(e) of the contract. Thus, the Court of Appeals will not be required to address legal or factual issues that are similar to those contained in the claims still pending before the trial court. On the contrary, failure to certify the "good faith" posting claim on appeal at this time would fragment its consideration from the significantly overlapping matters that are subject to appeal in *Long Beach III*. The adjudication of the "good faith" posting claim is final and will not be mooted or otherwise affected by adjudication of the remaining claims herein.

For the above reasons, this Court finds that there is no just reason for delay and, pursuant to Fed. R. Civ. P. 54(b), hereby directs immediate entry of judgment as to such "good faith" posting contract claim in Count III, as adjudicated in its Memorandum of Decision filed April 26, 1979. This Order and entry of judgment do not apply to defendant Texaco, Inc.

DATED: July 27, 1987

/s/ William P. Gray
United States District Judge

Approved As To Form:

by /s/ Andrew J. Kilcarr
ANDREW J. KILCARR
on behalf of defendants

by /s/ Gary L. Halling
GARY L. HALLING
on behalf of plaintiff

APPENDIX O

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 86-1771-WPG

(Long Beach III)

THE PEOPLE OF THE STATE OF CALIFORNIA, THE CITY OF LONG BEACH as Trustee for the State of California, and THE STATE OF CALIFORNIA as Beneficiary,

Plaintiffs,

v.

CHEVRON CORPORATION; UNOCAL CORPORATION; MOBIL OIL CORPORATION; SHELL OIL COMPANY; SHELL CALIFORNIA PRODUCTION, INC.; TEXACO, INC.; EXXON CORPORATION; EXXON COMPANY, U.S.A., and DOES 1 THROUGH 10, Inclusive,

Defendants.

[Filed Jul. 27, 1987]

FINAL JUDGMENT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 54(b)

This Court, having heard defendants' Motion to Dismiss the Complaint Pursuant to Federal Rules 12(b) and 56, having granted that motion as to Causes of Action One through Five and parts of Ten of the Complaint in its Order entered May 28, 1987, and having expressly determined that there is no just reason for delay and ex-

pressly directed entry of final judgment thereon pursuant to Rule 54(b) of the Federal Rules of Civil Procedure,

IT IS ORDERED AND ADJUDGED that plaintiffs take nothing with respect to the claims in Causes of Action One, Two, Three, Four, Five and in subparagraphs 126(a) through (d) of Cause of Action Ten as against defendants Chevron Corporation, Exxon Corporation, Exxon Company, U.S.A., Mobil Corporation, Shell Oil Company, Shell California Production, Inc., Union Oil Company of California and Unocal Corporation, and that such claims be dismissed on the merits with prejudice.

DATED: July 27, 1987

/s/ William P. Gray
United States District Judge

APPENDIX P

UNITED STATES DISTRICT COURT FOR THE
CENTRAL DISTRICT OF CALIFORNIA

MDL Docket No. 150-WPG

Long Beach
CV 75-2232 WPG

IN RE: COORDINATED PRETRIAL PROCEEDINGS IN
PETROLEUM PRODUCTS ANTITRUST LITIGATION

FINAL JUDGMENT PURSUANT TO
FEDERAL RULE OF CIVIL PROCEDURE 54(b)
AS TO DEFENDANT TEXACO, INC.

This Court, having issued its FINAL JUDGMENT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 54(b) as to defendants other than Texaco, Inc. on July 27, 1987, and having considered the stipulation between plaintiff and Texaco, Inc., for determination of the same issues as to Texaco, Inc., now issues the following judgment as to defendant Texaco, Inc.

This Court, having heard the defendants' motion for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, on the "good faith" posting claim of Count III, having granted that motion in its Memorandum of Decision filed April 26, 1979, and having expressly determined that there is no just reason for delay and expressly directed the entry of final judgment thereon pursuant to Rule 54(b) of the Federal Rules of Civil Procedure,

IT IS HEREBY ORDERED AND ADJUDGED that plaintiff, the City of Long Beach, take nothing with respect to the good faith posting claim decided on April 26, 1979, as against defendant Texaco, Inc., and that such claim be dismissed on the merits and with prejudice. This judgment does not apply to the remaining claims in this case and the conduct upon which they are based involving alleged breach of Articles 9(c) and 9(e) of the Contract.

Dated: October 30, 1987

/s/ William P. Gray
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 86-1771-WPG

THE PEOPLE OF THE STATE OF CALIFORNIA, THE CITY OF LONG BEACH as Trustee for the State of California, and THE STATE OF CALIFORNIA as Beneficiary,

Plaintiffs,

v.

CHEVRON CORPORATION; UNOCAL CORPORATION; MOBIL OIL CORPORATION; SHELL OIL COMPANY; SHELL CALIFORNIA PRODUCTION, INC.; TEXACO, INC.; EXXON CORPORATION; EXXON COMPANY, U.S.A., and DOES 1 THROUGH 10, Inclusive,

Defendants.

[Filed Oct. 30, 1987]

FINAL JUDGMENT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 54(b) AS TO DEFENDANT TEXACO, INC.

This Court, having previously issued its FINAL JUDGMENT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 54(b) on July 27, 1987, which did not apply to defendant Texaco, Inc., and having considered the stipulation between plaintiff and Texaco, Inc. for determination of the same issues as to Texaco, Inc., now issues the following order as to defendant Texaco, Inc.

This Court, having heard defendants' Motion to Dismiss the Complaint Pursuant to Federal Rules 12(b) and 56, having granted that motion as to Causes of Action One through Five and parts of Ten of the Complaint in its Order entered May 28, 1987, and having expressly determined that there is no just reason for delay and expressly directed entry of final judgment thereon pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

IT IS ORDERED AND ADJUDGED that plaintiffs take nothing with respect to the claims in Causes of Action One, Two, Three, Four, Five and in subparagraphs 126(a) through (d) of Cause of Action Ten as against defendant Texaco, Inc., and that such claims be dismissed on the merits with prejudice.

Dated: October 30, 1987

/s/ William P. Gray
United States District Judge

APPENDIX P

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-5859

D.C. Nos. CV-75-2232-WPG

CV-76-2839

CITY OF LONG BEACH, as trustee for the State of California,
Plaintiff-Appellant,

v.

STANDARD OIL COMPANY OF CALIFORNIA; TEXACO, INCORPORATED; EXXON CORPORATION; UNION OIL COMPANY OF CALIFORNIA; MOBIL OIL CORPORATION; SHELL OIL COMPANY,
Defendants-Appellees.

STATE OF CALIFORNIA, on behalf of itself and all political subdivisions and special districts within the state similarly situated,
Plaintiff-Appellant,

v.

STANDARD OIL CO., *et al.*,
Defendants-Appellees.

No. 86-5860

D. C. No. CV-82-3252-WPG

OPINION

CITY OF LONG BEACH,
Plaintiff-Appellant,

v.

STANDARD OIL CO., *et al.*,
Defendants-Appellees.

IN RE: COORDINATED PRETRIAL PROCEEDINGS IN PETROLEUM PRODUCTS ANTITRUST LITIGATION—MDL 150

Appeals from the United States District Court
for the Central District of California
William P. Gray, District Judge, Presiding

Argued and Submitted
October 4, 1988—San Francisco, California

Filed April 17, 1989

Before: Mary M. Schroeder, Jerome Farris and
Cecil F. Poole, Circuit Judges.

Opinion by Judge Farris

Counsel

Shirley M. Hufstedler, Hufstedler, Miller, Carlson & Beardsley; Royce H. Schulz and Gary L. Halling, Broad, Schulz, Larson & Wineberg; Gary W. Hoecker and M. Brian McMahon, Hoecker, McMahon & Wade, Los Angeles, California, for the plaintiffs-appellants City of Long Beach and State of California.

John R. Calhoun, City Attorney, and James N. McCabe, Deputy City Attorney, City of Long Beach, Long Beach, California, for the plaintiff-appellant City of Long Beach.

John K. Van de Kamp, Attorney General, Sanford N. Gruskin, Assistant Attorney General, Richard N. Light, Deputy Attorney General, State of California, for the plaintiff-appellant State of California.

Andrew J. Kilcarr and Maureen O'Bryon, Hogan & Hartson, Washington, D.C.; Charles F. Rice, New York, New York, for the defendant-appellee Mobile [sic] Oil Corporation.

Anthony P. Brown, Philip L. Judson, Paul R. Griffin, and Craig E. Stewart, Phillsbury [sic], Madison & Sutro, San Francisco, California, for the defendant-appellee Chevron Corporation.

Philip K. Verleger and David A. Destino, McCutchen, Black, Berleger & Shea, Los Angeles, California; Kenneth P. Fountain, Houston, Texas, for the defendant-appellee Exxon Corporation.

John S. Kingdon and Alan M. Grimaldi, Howrey & Simon, Washington, D.C.; Raymond V. McCord, Los Angeles, California, for the defendant-appellee Shell Oil Company.

Milton J. Schubin, Barry Willner and Aton Arbisser, Kaye, Scholer, Fierman, Hays & Handler, New York, New York; Robert D. Wilson, White Plains, New York, for the defendant-appellee Texaco, Inc.

Darryl Snider, Henry J. Kupperman, Scott J. Koepke and Michael W. Biren, Brobeck, Phleger & Harrison, and Harold E. Zohner, Los Angeles, California, the defendant-appellee Union Oil Company.

OPINION

FARRIS, Circuit Judge:

The City of Long Beach and the State of California appeal the district court's grant of summary judgment to the defendants, six major California oil companies.[1] The city charged the companies with conspiring to depress the posted price of crude oil in violation of federal and state antitrust laws.[2] The record satisfies us that the plaintiffs presented sufficient evidence to establish gen-

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[1] The defendants-appellees are Standard Oil Co. of California (now Chevron Corp.), Exxon Corp. (formerly Humble Oil & Refining Co.), Mobil Oil Corp., Shell Oil Co., Texaco, Inc., and Union Oil Co. of California. The seventh defendant, Atlantic Richfield Co., settled with plaintiffs and was dismissed from these suits on December 13, 1984.

[2] Three consolidated cases are involved in this appeal. D.C. No. CV-75-2232 was filed in June 1975 by the City of Long Beach; counts one and two of the second amended complaint alleged antitrust violations in the defendants' purchase of oil produced from lands owned in trust by the city for the benefit of the State of California. D.C. No. CV-76-2839 is a class action suit by the State of California on behalf of itself and its political subdivisions; the fifth cause of action of the second amended complaint alleged a conspiracy to depress crude oil prices and was severed and consolidated with No. 75-2232. The district court certified its summary judgment award on the antitrust claims as final under Fed. R. Civ. P. 54(b).

D.C. No. CV-82-3252 was filed by the City of Long Beach in June 1982 and alleged federal and state antitrust claims for oil produced from lands owned by the city in its proprietary capacity, as opposed to as trustee.

We have jurisdiction pursuant to 28 U.S.C. § 1291.

uine issues of material fact in support of their claims. We reverse and remand for trial.[3]

BACKGROUND

The City of Long Beach, both as trustee for state lands and as proprietor, owns oil produced from the Wilmington Oil Field. *See* 1964 Cal. Stats., Ch. 138 (1st Extra. Sess.). The field extends 11 miles southeast from the Wilmington District of Los Angeles through Long Beach Harbor and the offshore area of the City of Long Beach. Production from the 7,825 acre onshore portion began in the 1930's. In 1954, the city planned and supervised a seismic survey to determine the extent of the southeasterly offshore portion of the field. Problems with land subsidence arising from the onshore production delayed development of the offshore oil. In February 1962, after the preparation of a comprehensive development plan by the Harbor Department, city voters approved off-shore drilling. The California State Lands Commission approved the city's proposal to develop the 6,400 acre offshore area in late 1964.

In order to develop and market the oil from the 1.5 billion barrel field, in March 1965 the city sold interests in its production. The interests were awarded for a 35-year period based on bids for a percentage of the expected market price of the oil. A consortium composed of five of the companies (Texaco, Exxon, Union, Mobil, and Shell) obtained an 80% share, which also obligated the group to perform day-to-day operations as Field Contractor. Chevron and ARCO jointly obtained shares totalling

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[3] We also decide today in a separate opinion an appeal from the district court's award of summary judgment against the city on the pendent state contract claims included in the complaint filed in D.C. No. CV-75-2232. *City of Long Beach v. Standard Oil Co.*, —— F.2d —— (9th Cir. 1989). That opinion also considers the removal of state law claims, originally filed in state court in 1986, concerning a later time period.

10% of production. The remaining 10% share went to companies not involved in this litigation. The winning bids ranged from 95.56% for the Field Contractors' share to 100% for a 5% share won by Chevron and ARCO.

A Contractors' Agreement, executed by the parties in March 1965 after two years of preparation and discussion, contained detailed pricing provisions for the oil sold to the companies.[4] The price was based substantially upon the arithmetical average of prices "posted" during the month by major purchasers in the Wilmington field and other named fields. Posted prices are prices that a prospective purchaser publicly declares it is willing to pay for crude oil. Chevron, ARCO, Mobil, and Union were the only purchasers to regularly post prices in the Wilmington field.

In 1975, the City of Long Beach and the State of California brought suit against seven major California oil companies charging violations of federal and state antitrust statutes. The city alleges that the companies conspired to fix and maintain uniform, noncompetitive posted prices for the kind of crude oil produced from the Wilmington field, and that those postings were below the prices that buyers in a free, open market would have paid.

The district court granted summary judgment on several alternative grounds. On July 19, 1984, the court entered partial summary judgment for the companies for the period April 12, 1972 to October 1, 1976, conducting that federal price controls supplanted the alleged conspiracy as the effective reason for the crude oil price levels. On December 17, 1984, the court entered partial summary judgment for the period November 1, 1974 through 1977, based on the federal Entitlements Pro-

[4] A more detailed discussion of the pricing provisions is contained in our companion opinion on the contract claims.

gram's effect on the value of the city's oil. On September 19, 1985, the court entered a complete summary judgment for the companies. The court found that the federal Mandatory Oil Import Program precluded recovery for the remaining period of alleged liability, June 27, 1971 to April 12, 1972, and as an alternative ground that the city had failed to present sufficient evidence to prove the alleged antitrust conspiracy.

We review the district court's grant of summary judgment de novo. *Harkins Amusement Enterprises, Inc. v. General Cinema Corp.*, 850 F.2d 477, 482 (9th Cir. 1988), *cert. denied*, 109 S. Ct. 817 (1989). To overcome summary judgment the non-moving party "must establish that there is a genuine issue of material fact" and demonstrate more than "some metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Id.* at 587 (citing *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289 (1968), Fed. R. Civ. P. 56(e)).

In reviewing the summary judgment motion we accept the city's undisputed allegations as true:

(1) The California oil market is isolated and dominated by the defendant companies. This dominance encompasses the production, transportation, and refining sectors of the industry.

(2) The posted prices for heavy crude oil generally were stable throughout the period of the alleged conspiracy (1961-1977). Price increases did occur in 1969, 1970, and 1973.

(3) The composition of crude oil varies. Heavier-weight crudes generally are less desirable for refinery feed stock than lighter-weight crudes. For a given refinery configuration, the lighter-weight crude can be

refined into a larger volume of more valuable "light" products (i.e., gasoline as opposed to fuel oil). Alternatively, a greater capital investment in refinery equipment is required to produce light products from a heavy crude. As a result of this difference in value, lighter weight crude generally is more expensive than heavier weight oil. Crude oil weight is measured on gravity scale in degrees. The difference in price for crude oils of varying weights on a posted price schedule is known as the "gravity price differential." The oil owned by the city was a heavy crude.

(4) The companies engaged in barter transactions, called three-cut exchanges, to move oil from fields to re- substantial volumes of oil traded in three-cut exchanges fineries as efficiently as possible. The accounting for the was not done on the basis of posted prices, but on refinery product yields adjusted to balance volumes.

(5) In 1961-62, employees of five out of the six defendant companies met to discuss and revise the technical specifications for the three-cut exchanges. The parties disagree over whether the meetings were secret and whether the city was aware of the widespread use of three-cut exchanges.

DISCUSSION

A. Legal Standard

Section 1 of the Sherman Act declares illegal "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce . . . ." 15 U.S.C. § 1. Section 4 of the Clayton Act allows any person "injured in his business or property by reason of anything forbidden in the antitrust laws [to] recover threefold the damages by him sustained. . . ." 15 U.S.C. § 15(a).

To maintain a successful action, the city must show a contract, combination, or conspiracy that restrains trade and causes harm to itself and to competition in

general. *See Matsushita*, 475 U.S. at 586; *Christofferson Dairy, Inc. v. MMM Sales, Inc.*, 849 F.2d 1168, 1172 (9th Cir. 1988); *see also USA Petroleum Co. v. Atlantic Richfield Co.*, 859 F.2d 687, 697 (9th Cir. 1988) (concluding that injury done to market and to competitors by vertical, non-predatory, maximum price-fixing conspiracy is antitrust injury). The city must present "direct or circumstantial evidence that reasonably tends to prove . . . a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 768 (1984). Although conspiracy may be inferred from circumstantial evidence, the evidence must tend to exclude the possibility that the defendants acted independently and lawfully. *Id.* at 763-64; *Wilcox v. First Interstate Bank of Oregon, N.A.*, 815 F.2d 522, 525 (9th Cir. 1987). In analyzing the evidence at the summary judgment stage of an antitrust action, "plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *See Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) (remanding for new trial); *Wilcox*, 815 F.2d at 526.

The city claims that the three-cut exchange agreement is unlawful *per se*. Whatever the effect of the three-cut exchanges on posted prices, the agreement concerning the exchanges themselves cannot be flatly classified as a price-fixing arrangement. *Cf. Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 349-51 (1982). On their face, the three-cut exchanges cannot be held to have a single purpose of stifling competition. As explained below, the exchanges have other justifiable purposes, and so should be scrutinized under the Rule of Reason. *See Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 19-20 (1979); *Coastal Transfer Co. v. Toyota Motor Sales, U.S.A.*, 833 F.2d 208, 211 (9th Cir. 1987); *see*

also Business Electronics Corp. v. Sharp Electronics Corp., 108 S. Ct. 1515, 1519-20 (1988).

B. The Conspiracy

The city claims that the companies violated the antitrust laws by conspiring to maintain an artificially low posted price for Wilmington oil. The city alleges that the companies accomplished this by using three-cut exchanges and artificially high gravity price differentials to maintain a dual price structure. Posted prices allegedly were kept low to reduce the companies' payments to the city for the publicly-owned Wilmington oil, while the companies used three-cut exchanges to maintain market values in transactions among themselves. The city further alleges that in the absence of this anticompetitive behavior, market forces would have increased the price of the Wilmington oil. More specifically, the city asserts that:

1) In their posted prices, the defendants systematically undervalued heavy crude oils, resulting in the underpricing of the city's oil.

(2) the gravity price differentials for the companies' posted prices were artificially large in comparison to the value of the oil in the market place, resulting in the underpricing of the city's oil.

(3) The purpose of the three-cut exchange was to escape the problematic consequences of the deliberate underpricing in posted prices of the city's oil. The three-cut exchanges enabled the companies to trade crude oil at market value and avoid the market distortion caused by the artificially low posted prices.

(4) The 1961-62 technical meetings were held secretly to further this purpose.

(5) The companies operated their private pipelines, adhered to posted prices, exchanged price information,

and set the gravity price differentials for Alaska Cook Inlet oil in a manner that assisted their policy of underpricing heavy California oil.

(6) the companies experienced shortages of heavy crude oil in California such that, in an open market, higher prices would have resulted.

(7) The refinery value of various crude oils—that is, the dollar value of the products obtained from processing a given barrel of oil in a particular refinery—is material to the pricing issues raised by the antitrust claims.

(8) The federal Mandatory Oil Import Program, in effect from 1959-73, did not prevent the companies from increasing crude oil prices.

(9) Neither federal price controls, first imposed in 1971, nor the federal Entitlement Program, implemented in 1974 to correct inequities among refiners using controlled-price crude oil versus exempt or imported oil, caused the alleged depressed price for the city's oil.

To prove its case at trial, the city must convince the trier of fact that the companies conspired, or at least acted in concious parallel, to fix and post artificially high gravity price differentials resulting in the city's receiving artificially low prices for its crude. The city has provided no direct evidence that such a conspiracy or conscious parallelism ocurred. However, it has provided evidence of circumstances that point to the existence of such a conspiracy.

The record shows that the companies widely used the three-cut exchange system as an alternative to valuing barter transactions at posted prices. The companies held meetings in 1961 and 1962 to ensure that the three-cut exchange system more accurately reflected the value of the crude to the bartering parties. The record also shows that the three-cut exchange system was cumbersome and inconvenient to maintain. The city alleges that the com-

panies used such a technically intricate system, rather than valuing the crude at posted prices, because the posted prices for heavier crudes were fixed to cheat sellers of crude. Although the parties agree that barter transactions were necessary to everyday oil operations, the city argues that the three-cut exchange system enabled the companies to value the crude bartered among themselves in a manner that avoided the rigged posted priecs. The city cites the companies' efforts to maintain the three-cut exchange system as evidence that all the companies knew the posted prices were improper. The unusual effort put into the maintenance of the three-cut exchange system does constitute circumstantial evidence of conspiratorial price fixing.

When only circumstantial evidence of a conspiracy is offered, a defendant is entitled to summary judgment if it provides a plausible and justifiable alternative interpretation of its conduct that rebuts the alleged conspiracy. *T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Assoc.*, 809 F.2d 626, 632 (9th Cir. 1987). For example, parallel changes in prices and exchanges of price information by competitors may be motivated by legitimate business concerns. *See Wilcox*, 815 F.2d at 526-27. The companies explain, with support in the record, that the three-cut exchanges had been ongoing, the 1961-62 meetings were held to address valid technical issues only tangentially related to pricing, and the posting system itself was lawful.

The city presents evidence to rebut the companies' explanation for their conduct. The three-cut exchanges were cumbersome and inconvenient. At various times, market conditions should have caused some of the companies to post higher crude prices. Posted prices often did not correspond to market value. At least one company acknowledged that an increase in the posted price would result in increased payments to Long Beach. A question also is raised by ARCO's requirement that it be idemnified

for potential liability to the city arising from use of the three-cut exchanges.

The city raises a genuine issue of material fact over whether shortages of heavy crude oil existed and should have caused an increase in posted prices. The district court incorrectly concluded that the city's evidence related only to anticipated shortages. It also erred in relying on a 1978 statement to Congress by the California Comptroller that a surplus of domestic crude existed in the region. The statement is largely irrelevant to this suit because it was made after the July 1977 entry of Alaska North Slope oil into the California market.

The district court found that the city's analysis of marginal refinery values had no significance. Although the questions raised by the district court would be valid cross-examination, the refinery value analysis is relevant, material evidence. It would assist the trier of fact in the search for truth, Fed. R. Evid. 702, and its probative value is not outweighed by the danger of misleading the jury, Fed. R. Evid. 403. Given the companies' dominance of the market, the analysis is critical in proving damages. *See Shad v. Dean Witter Reynolds, Inc.*, 799 F.2d 525, 529-530 (9th Cir. 1986) (finding introduction of expert opinion essential); *compare McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 806-807 (9th Cir. 1988) (finding expert opinion properly excluded because based on unsupported assumptions and flawed analysis).

Under the doctrine of conscious parallelism, an agreement may be inferred if each participant knew that concerted action was contemplated and invited, gave its adherence to and participated in the scheme, and understood that cooperation was essential to the plan. *Barry v. Blue Cross of California*, 805 F.2d 866, 869 (9th Cir. 1986) (citing *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939)). The record shows that the companies were aware of the disparity between posted

prices and three-cut exchange values and of the disparity between the posted prices and refining values for heavy crude oils. Each knew that the participation of all the companies was necessary to make the plan work, and, with the exception of Exxon, actively participated in the meetings to maintain the utility of the three-cut exchanges. Each engaged in three-cut exchanges. Because the companies dominated the relevant market, each understood the necessity of cooperation. *See Barry*, 805 F.2d at 869 (knowledge that cooperation is essential shown by oligopolistic market structure); *see also* Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 Stan. L.Rev. 1562, 1575-1587 (1969) (viewing noncompetitive pricing by oligopolists as collusive and § 1 of Sharman Act as appropriate remedy).

Additionally, the district court recognized that four of the six companies—Chevron, Union, Mobil, and Shell—had substantial incentives to conspire. The district court disregarded the city's explanation of the incentives to conspire, such as access to pipelines and long term refining plans, for Texaco and Exxon. The record shows that the companies all recognized that artificially maintaining lower posted prices was in their best interests. Whether this evidence will support at least an inference of an agreement among the companies is a question for the trier of fact.

Genuine issues of material fact exist over the effect of the Mandatory Oil Import Program on oil prices from 1959-1973. The program's primary purpose was to promote national security by encouraging domestic oil production. Presidential Proclamation No. 3279, 3 C.F.R. 11 (1959-63 Comp.); *see Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 552 (1976). The companies argue that crude prices were low because the import program also sought to stabilize domestic crude oil prices. The record contains significant, persuasive evidence that the import program was not intended to pre-

vent crude oil prices from rising and would have allowed the price for the city's oil to increase.

Genuine issues of material fact exist with regard to the Entitlements Program. The program aimed to increase the cost to refiners of controlled oil, such as the city's, to roughly equal the cost of uncontrolled oil. Long Beach has shown that the controlled price for the city's oil may have been greater in the absence of the conspiracy. Therefore, the program does not excuse the companies from potential antitrust liability. However, we recognize that the existence of the Entitlements Program may affect potential damages significantly.

The city has raised genuine issues of material fact. It has presented significant evidence of an antitrust conspiracy that tends to exclude the possibility of independent action. An inference of collusive action reasonably and plausibly may be made based on the evidence presented. Unlike *Matsushita*, this is not a case of legitimate price competition or an implausible predatory pricing scheme. *Cf.* 475 U.S. at 588-595. A trier of fact must evaluate the substantial evidence in the record in support of the city's antitrust claim.

C. Price Controls and Legal Injury

The district court barred the Long Beach claims because during all but a few months of the damage period, it found that federal price control programs, and not the companies' actions, were the legal cause of the alleged injury—underpriced crude oil. Because Long Beach had no right to receive prices greater than the federal ceiling price for its oil, the court found that it had suffered no legal injury and therefore had no claim for relief.

Long Beach argues that the companies conspired to set an artificially low price for crude oil, and in the absence of that conspiracy, the price controls imposed by the

federal government after the conspiracy began would have had a higher ceiling. The companies responded that the crude oil prices were limited by the federal government with full knowledge of the allegation that they were too low, and therefore the federal government, and not the companies, was the "supervening" legal cause of any injury suffered by Long Beach. The companies make the ambitious claim that, as a matter of law, they should be shielded from antitrust liability because the low prices of which Long Beach complains were set by a government agency.

The district court made detailed findings of fact on the relationship between the price control program and the companies' prices for crude oil. The court found that price control administrators had rejected, at several points beginning on April 12, 1972, the arguments of California producers that crude oil prices were too low. The court concluded that even if Long Beach could prove a price-fixing conspiracy, as a result of the actions of federal price control administrators from April 12, 1972, until October 1, 1976, Long Beach had no right to any damages. The court reasoned that the city suffered no legal injury because the companies paid the city all that the law allowed, and therefore should not be liable for any additional amounts. We understand but reject the argument.

The establishment of price ceilings by the federal government, after the alleged conspiracy began, does not in itself mean that the companies' conduct could not have caused the injuries. If unlawful underpricing did occur, the harmful effects continued. If historical prices had been higher, the ceiling prices might have been higher "but for" the alleged conspiracy. *See Woods Exploration and Production Co. v. Aluminum Co. of America*, 438 F.2d 1286, 1292-98 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972). *Woods* was a federal antitrust action in which the plaintiffs charged that the defendants filed false natural gas production forecasts with the Texas Railroad

Commission in order to reduce the production allowances for the plaintiffs. The district court granted partial summary judgment for the defendants on the ground that the plaintiffs were not entitled to recover damages, because the Texas Railroad Commission, and not the defendants, set the allowances. The Fifth Circuit reversed and remanded for trial, stating that because the Commission's actions were based on false information, liability existed. *Id.* at 1295-98; *see also City of New Orleans v. United Gas Pipe Line Co.*, 517 So. 2d 145, 156 (La. App. 1987), *cert. denied*, 109 S. Ct. — (1988) (holding delivery obligations under gas contract not superceded by federal orders because company's earlier failures to obtain supplies caused problem). In this case, if the price ceilings were based on prices set artificially low as a result of an unlawful conspiracy, liability should still exist.

The companies incorrectly characterize the price control program as a supervening or superceding cause of the injury to the city. The city does not argue that the companies conspired to influence the price control program or that the price control program was the cause of its injury. *Cf. United Mine Workers v. Pennington*, 381 U.S. 657, 670-71 (1965) (no antitrust liability for joint efforts to influence government officials or for injuries resulting from related action by government official); *Okenfenokee Rural Electric Membership Corp. v. Florida Power & Light Co.*, 214 F.2d 413, 418 (5th Cir. 1954) (no antitrust liability for injuries resulting from valid government officials does not absolve an otherwise illegal conspiracy. *See Woods*, 438 F.2d at 1298. If Long Beach can persuade a fact-finder that the price of crude oil would have been set at a different level but for the allegedly illegal agreement, it is entitled to damages. It overcomes summary judgment in presenting sufficient evidence to raise a genuine issue of material fact as to whether price controls would have been set at a different level in the absence of the alleged conspiracy.

A related question is whether the setting of price ceilings under the authority of the Economic Stabilization Act effectively should shelter the companies from antitrust liability for conduct not specifically approved by the act. *See Petroleum Products Antitrust Litigation*, 830 F.2d 198, 201 (Em. App.), *cert. denied*, 108 S. Ct. 466 (1987). In other words, does federal price regulation displace private antitrust regulation? If a substantive, comprehensive regulatory scheme exists, the Court has found that the private damages provisions of the antitrust laws are not an available remedy. *See Square D Co. v. Niagra Frontier Tariff Bureau*, 476 U.S. 409, 422 (1986) (citing *Keogh v. Chicago and N.W. Ry. Co.*, 260 U.S. 156 (1922)).

The district court's analysis implies that during a period of price controls, antitrust claims involving conspiracies to underprice, such as predatory pricing or the alleged agreement in this case, may not be pursued in the courts. For a regulatory program, such as price controls, to displace an antitrust claim the relief desired must be available from the regulatory agency. *Barnes v. Arden Mayfair, Inc.*, 759 F.2d 676, 679, (9th Cir. 1985) (citing *Keogh*). An exemption will be implied if necessary to give the regulatory statute full effect. *Barnes*, 759 F.2d at 679; *Foremost International Tours v. Quantas Airways Ltd.*, 525 F.2d 281, 284 (9th Cir. 1975), *cert. denied*, 429 U.S. 816 (1976); *see* Areeda & Turner, *Antitrust Law*, ¶ 224 (1978). Unless the conflict between the regulatory decision and antitrust liability is obvious, as with comprehensive ICC regulation of railroad rates and practices, the Court will not find an implied repeal of the antitrust laws. *See* Von Kalinowski, *Antitrust Laws & Trade Regulation* § 44A.02[2] (1988). If the challenged activity is beyond the scope of the regulatory body, no exemption will be found. *Barnes*, 759 F.2d at 679.

Implied repeals of the antitrust statutes are disfavored, and require a convincing showing that the antitrust laws and the regulatory program cannot coexist. *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 378, 388-89 (1981). Long Beach points to substantial administrative and legislative history that tends to show that the price control statutes were not intended to supplant the antitrust statutes. Additionally, the 1973 Emergency Petroleum Allocation Act, which continued price controls on crude oil, contained a provision prohibiting any construction of its provisions that would create any defenses to antitrust actions. Pub. L. No. 93-159, § 6 (1973), 15 U.S.C. § 755(c) (provision effective from 1973-1975, repealed by § 453, Energy Policy and Conservation Act, Pub. L. No. 94-163 (1975)); *see Typhoon Car Wash, Inc. v. Mobil Oil Corp.*, 770 F.2d 1085, 1089-90 (Em. App.), *cert. denied*, 474 U.S. 981 (1985).

The price ceilings set by the government were based on prices in effect at the time controls weer imposed. The price control administrators did not examine the antitrust claims of the city. No independent analysis, comparable to the rate-making in *Keough*, was performed. Without such an independent analysis, the government's actions do not immunize the companies from civil antitrust liability. *See Foremost International Tours*, 525 F.2d at 285-87; Areeda, *supra*, at ¶¶ 224, 225. The existence of price controls will affect the determination of potential damages but does not absolve the companies of antitrust liability.

CONCLUSION

Long Beach presented sufficient evidence to raise genuine issues of material fact in support of its conspiracy claims, and to overcome the defenses that the Mandatory Oil Import Program, the Entitlements Program, or fed-

eral price controls were the cause of the alleged depressed price for its crude oil.[5]

REVERSED and REMANDED for trial.

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[5] In *Petroleum Products Antitrust Litigation*, 830 F.2d 198 (Em. App.), *cert. denied*, 108 S. Ct. 466 (1987), the Temporary Emergency Court of Appeals considered an interlocutory appeal by the city of the partial summary judgment dismissing the antitrust claims beginning April 12, 1972, because of the effect of federal price controls. TECA ruled that the issues raised were nonjusticiable until the underlying antitrust liability was resolved. *Id.* at 203. TECA noted that two issues were potentially within its sphere of authority, and could be appealed to it if and when justiciable:

> A. Whether or not 6 C.F.R. Sec. 101.34(a)(2), which exempted state and local governments from price controls under certain circumstances, applied to sales of "net profits oil" by appellants during the periods April 12, 1972 to June 13, 1973, and August 19, 1973 to October 25, 1973?
>
> . . .
>
> C. Whether or not compliance with Phase III price controls was "voluntary" during the period of January 11, 1973 to June 13, 1973 so that appellees were not prohibited from making appropriate price adjustments for the crude oil sold by appellants during this period?

Id. at 200, 203. We did not consider the above issues, and express no opinion on the appropriate time for the parties to raise them with TECA.

APPENDIX Q

STATEMENT PURSUANT TO RULE 28.1

CHEVRON CORPORATION

Canyon Reef Carriers, Inc.
Chevron Capital, N.V.
Chevron Capital U.S.A. Inc.
Chevron Investment Management Company
Chevron Oil Finance Company
Felix Oil Company
Gulf Oil Finance N.V.

EXXON CORPORATION

Affiliates and Subsidiaries—Not Wholly-Owned *

AT&S Exploration Ltd.
Abu Dhabi Petroleum Company Limited
Ace Polymer Co., Ltd.
Aditivos Orinoco, C. A.
Adria-Wion Pipeline Gesellschaft mit beschrankter Haftung
Aircraft Fuel Supply B. V.
Aishin Schiyu K. K.
Alberta Products Pipe Line Ltd.
Al-Jubail Petrochemical Company
Altona Petrochemical Company Limited
Alyeska Pipeline Service Company
Arabian American Oil Company
Aramco Overseas Company
Aramco Services Company
Asakawa Sekiyu K.K.
Atlas Supply Company
Atlas Supply Company of Canada Limited
Australian Synthetic Rubber Company Limited
Aviation Services Saudi Arabia Limited
Awaji Gas Nenryo Kabushiki Kaisha
Azuma Sekiyu K.K.
BEB Erdgas und Erdoel GmbH, Hannover
BT Asia Securities Limited
B.W.O.C., Inc.
Bangkok Aviation Fuel Services Limited
Banshu Ekika Gas K. K.
Beyerische Erdgasleitung G.m.b.H.
Beaverhill Resources Limited
Bel-Air Entreposage S. A.
BRIGITTA Erdgas und Erdoel GmbH, Hannover
Bryan Woodbine Gathering Inc.

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* Does not include companies with less than 5% Exxon Ownership.

Bryon Creek Collieries (1983) Limited
Canadian Reserve Oil & Gas Ltd.
Carlew Inc.
Carnduff Gas Limited
Cary Chemicals Inc.
Castle Peak Power Company Limited
Champlain Oil Products Limited
Changi Airport Fuel Hydrant Installation Pte. Ltd.
Chinchaga Resources Limited
Chuo Sekiyu Hanbai K.K.
Clermont Coal Mines Limited
Comcor Chemicals Limited
Commercial Polymers Pty. Ltd.
Cynthia Gas Gathering Company Limited
Compania Minera Disputada de Las Condes S.A.
Comptoir Auxiliaire du Petrole
Comptoir Oxonnaxion des Combustibles (C.O.C.)
Computer Centrum Groningon B.V.
DFTC Deutsche Fluessigerdgas Terminal GmbH
Daihatsu Sekiyu K.K.
Daiichi Kouyu K. K.
Demulsificantes Del Orinoco, C.A.
Depot Petrolier du Gresivaudan
Depots de Petrole Cotiers
Depots Petrolier de la Corse
Deudan-Holding GmbH
Deutsche Erdgas Trasport G.m.b.H.
Deutsche Transalpine Oelleitung G.m.b.H.
Devon Estates Limited
Dixie Pipeline Company
Dukhan Service Company
E S F Limited
Eagle Kenso K.K.
East Texas Salt Water Disposal Company
Eastcoast spill Response Inc.
Eiko Sekiyu K.K.
Elwerath Erdgas und Erdoel GmbH, Hannover
Elwerath Erdoel und Erdgas AG

Emirates Chemicals Company
Emori Sekiyu K.K.
Emsland-Erdoelleitung G.m.b.H.
Energie Marketing Service GmbH (EMS)
Entrepot Petrolier de l'Aveyron (E.P.A.)
Entrepot Petrolier de Mulhouse (E.P.M.)
Erdgas-Varkaufs-Gesellschaft m.b.H.
Esso Chemical Alberta Limited
Esso Energie G.I.E.
Esso Exploration and Production Angola Inc.
Esso Malaysia Berhad
Esso of Canada Limited
Esso Resources Canada Limited
Esso Resources Enterprises Ltd.
Esso Resources N.W.T. Limited
Esso Resources (1989) Ltd.
Esso Resources Properties Inc.
Esso Resources Ventures Limited
Esso Societe Anonyme Francaise
Esso Standard Tunisie S. A.
Etablissements Cloarec
Exact Reisebyra A/S
Exxon Chemical Pakistan Limited
489061 Ontario Inc.
F. T. Giken Kabushiki Kaisha
Federated Pipe Lines Ltd.
Ferngas Nordbayarn G.m.b.H.
Ferngas Salzgitter GmbH
Forjas de Colombia, S. A.
Fuji Kogyo K.K.
Gasunie Engineering B.V.
General Bussen K.K.
General Highway K.K.
General Petrochemical Industries Limited
General Sekiyu K.K.
General Sekiyu Okinawa Hanbai K.K.
General Sekiyu Overseas Ltd.
General Shipping Co. Ltd.

General Unyu Kabushiki Kaisha
Geobutane—Lavera
Gewerkschaft Brassort Erdoel und Erdgas GmbH
Gewerkschaft Erdoel-Raffinerie Deurag-Nerag
Gewerkschaft Gute Hoffnung Erdgas und Erdoel GmbH
Gewerkschaft Kuchen Erdgas under Erdoel GmbH
Glen Park Gas Pipe Line Company Limited
Goroku Sekiyu K.K.
Grande Ecaille Land Company, Inc.
Great Eastern Oil Limited
Groupement Immobilior Petrolier
Groupement Liants Routiers du Gard Esso-Viafrance (G.L.R.G.E.V.)
Groupement Petrolier Aviation
Groupement Petrolier de la Cote D'Asur
Groupement Petrolier de Nantes
Groupement Petrolier du Finistere G.I.E.
Hamburger Gaswerke GmbH
Hannoversche Erdoelleitung G.m.b.H.
Hanshin Kyowa Sekiyu K.K.
Hayakawa Sekiyu K.K.
Heinrich Schneider Spedition GmbH
Hiroshima General Gas Juten Kabushiki Kaisha
Hosi Sekiyu K.K.
Hokushin Bussan K.K.
Hokuyu Sekiyu K. K.
Home Energy Company Ltd.
Home Oil Company Limited
Hong Kong Pumped Storage Development Company, Limited
Houston Regional Monitoring Corporation
Hydranten-Betriebegesellschaft
Hydrierwerke Poelitz Aktiengesellschaft
Imperial Oil Limited
Imperial Pipe Line Company, Limited, The
Inada Ekka Gas Kabushiki Kaisha
Industria Acqua Siracusana S.p.A.
Industry Promotion Enterprises Limited

Intamix Corporation
Interhome Energy Inc.
Interprovincial Pipe Line (Alberta) Ltd.
Interprovincial Pipe Line (NW) Ltd.
Intoplane Service Company Limited
Iranian Oil Participants Limited
Iranian Oil Services (Holdings) Limited
Iran Oil Services Limited
Iraq Petroleum Company, Limited
Iraq Petroleum Pensions, Limited
Japan Butyl Company Limited
Japan Coal Liquefaction Development Company, Ltd.
Jersoy Nuclear-Avco Isotopes, Inc.
K.K. Aizu General
K.K. Daimaru
K.K. General Sekiyu Hanbaisho
K.K. Gentech
K.K. Heian Sekiyu
K.K. Ito Sekiyuten
K.K. Kanagawa Sekiyu Shokai
K.K. Kyosi Agency
K.K. Kyosi Shosha
K.K. Kyowa Sekiyu Service
K.K. Marugo Izumase Shoten
K.K. Marutaka Sekiyu
K.K. Momose Sekiyu
K.K. Nippatsu
K.K. Standard Sekiyu Onaka Hatsubaisho
K.K. Toresen
K.K. Uwano Sekiyu Shokai
K/S Statfjord Transport A/S & Co.
Kabushiki Kaisha Sankyo Plastics
Kai Tak Refuellers Company Limited
Kanto Kygnus Sekiyu Hambai K.K.
Karisruhe-Stuttgart Rohrleitung Gesellschaft mbH
Kawasaki Kygnus Sekiyu Hambai Kabushiki Kaisha
Kaihan Sekiyu K.K.
Keiyo Sekiyu Hanbai K.K.
Kenya Petroleum Refineries Limited

Kibo Sekiyu Hanbai K.K.
Kimura Sekiyu Kabushiki Kaisha
Kinwa Sekiyu K.K.
Kobe Standard Sekiyu K. K.
Kowa Sekiyu K.K.
Kowloon Electricity Supply Company Limited
Kumho E.P. Rubber Co., Ltd.
Kygnus Ekka Gas Kabushiki Kaisha
Kygnus Kosan Kabushiki Kaisha
Kygnus Marketing Service K.K.
Kygnus Sekiyu K. K.
Kyushu Eagle K.K.
LPL Investments, Inc.
La Societe Acadienne de Recherches Petrolieres SAREP
Lakehead Pipe Line Company, Inc.
LEAG Aktiengesellschaft feur luzernisches Erdoel
Les Docka das Petroles d'Ambes -
Long Beach Oil Development Company
Maasvlakte Coal Terminal B.V.
Maasvlakte Olic Terminal N.V.
Magota Sekiyu K.K.
Mainline Pipelines Limited
Manito Pipelines Ltd.
Maple Leaf Petroleum Limited
Marugo Gas K.K.
McColl-Frontenac Inc.
McColl-Frontenac Oil Co. Ltd.
MEGALL FINCO
MECAL GmbH
Meiji Sekiyu K.K.
MESBIC Financial Corporation of Houston
Metro Fuel Co. Ltd.
Mikawa Bussan K.K.
Minerals Limited
Mittelrheinische Erdgas Transport Gesellschaft mit beschreankter Haftung
Montreal Pipe Line Limited/Las Pipe-Lines Montreal Limitee

Mount Hanikris Limited
Mount Thorley Coal Loading Limited
Mr. Lube Canada Inc.
Mytax Polymers Incorporated
NAM—K 7 B.V.
NAM—K 14 B.V.
NAM—K 15 B.V.
NAM/CLOMS—K S/K 11 B.V.
NAM/CLOMS—L 13 B.V.
NPC Services, Inc.
N. V. Nederlandse Gasunie
Nakabayashi Sekiyu K.K.
Nansei Oil Terminal K.K.
Nansei Sekiyu Kabushiki Kaisha
Nanseiki Kaihatsu K.K.
Native Venture Capital Co. Ltd.
Near East Development Corporation
Nederlandso Aardolie Mastschappij B. V.
Neptune Bulk Terminals (Canada) Ltd.
Nichimo Oil (Bermuda) Co., Ltd.
Nichimo Sekiyu Seisei Kabushiki Kaisha
Nikko Sangyo K.K.
Nippon Unicar K.K.
Nisku Products Pipe Line Company Limited
Nissei Sekiyu Kabushiki Kaisha
Norddeutsche Erdgas-Aufbereitungs G.m.b.H.
Norddeutsche Erdgas-Aufbereitungs G.m.b.H.
Nordrheinischo Erdgas Transport Gesellschaft mit beschrankter Haftung
Nord-West Oelleitung G.m.b.H.
Noroxo
Northward Developments Ltd.
Nottingham Gas Limited
107580 Canada Inc.
151742 Canada Inc.
159129 Canada Inc.
160440 Canada Limited
160837 Caanda Limited

165548 Canada Limited
165549 Canada Limited
165550 Canada Limited
165899 Canada Limited
Office Prive d'Assurances et de Courtages
Offshore Medical Support Limited
Oil Field Chemicals Company (Saudi Arabia) Ltd.
Oil Service Company of Iran (Private Company)
Oil Spill Response Limited
Oil Transport Company (Saudi Arabia) Limited
Oilship Limited
Oldonburgische Erdocal Gesellschaft m.b.H.
Osaka Ashyu Nonryou K.K.
Osaka Propane Gas Hombei Kabushiki Kaisha
Osaka Sekiyu Gas Yuso K. K.
P.A.C. S.A.R.L. (Pinson Allegret-Causse)
P. T. Stanvac Indonesia
Pars Investment Corporation
Peninsula Electric Power Company Limited
Petroleum Refineries (Australia) Proprietary Limited
Petroleum Services (Middle East) Limited
Petrosvibri S.A.
Pipe Line Services, Inc.
Plantation Pipe Line Company
Portland Pipe Line Corporation
Primaer Oel GmbH
Progas A/S
Progas Limited
Raffinerie du Midi S.A.R.L.
Rainbow Pipe Line Company, Ltd.
Radwater Water Disposal Company Limited
Refineria Petrolera Acajutla, S. A.
Rheingas Erdgasleitungs-Gesellschaft m.b.H.
Rochevert Inc.
Rotterdam Antwerpen Pijpleiding (Belgie)
Rotterdam-Antwerpen Pijpleiding (Nederland) N. V.
Ruhrgas Aktiengesellschaft

S.A. du Pipeline a Produits Petroleiers sur Territoroire Genevois (SAPPRO)
S.A.R.L. Visin
S.O.P.—Societe Oleodotti Padani S. p. A.
Saitama Sekiyu Hanbai K.K.
Sakurajima Futo K.K.
Sanyo Sekiyu K.K.
Saraco S. A.
Saudi Arabian Lube Additives Company Limited
Schubert KG
Scurry-Rainbow Oil Limited
SEAG Aktiengesellschaft fuer schweizerisches Erdoel
Seibu Kygnus Sekiyu Hambai Kabushiki Kaisha
Seismic Industries A/S
Senpoku Oil Service K.K.
SERAM Societa per Azioni
Servacar Ltd.
Shehtah Drilling Limited
Shimoyama Sekiyu K.K.
Shin-Nihon Yukagaku Kogyo K. K.
Shinohara Oil K.K.
Shieuoka Kanasho Hambai Kabushiki Kaisha
Smiley Gas Conservation Limited
Sociedad Anonima "Escuela Campo Alegre"
Sociedad de Inversiones de Aviacion
Sociedad Nacional de Oleoductos Ltda.
Societa Italiana per l'Oleodotto Transalpino S.p.A.
Societa per Azioni Raffineria Padana Olii Minerali-SARPOM
Societe Anonyme de Gestion de Stocks de Securite (SAGESS)
Societe Anonyme de la Raffinerie des Antilles
Societe Anonyme des Hydrocarbures
Societe Anonyme "Produits Lubrifiants de Madagascar" —PROLUMA S.A.
Societe Civile de Mustapha Algeria
Societe Civile de Participation pour la Destruction des Dachets Industriels (SOCDI)

Societe Civile Immobiliere "Courcelles-Etoile"
Societe Civile Immobiliere Khariessa
Societe Civile Immboliere "Kleber-Etoile"
Societe Civile Immobiliere "Les Casseaux-Bougainville"
Societe de la Raffinerie d'Alger
Societe de Manutention de Carburants Aviation
Societe de Manutention de Carburants Aviation Dakar-Yoff, S. A.
Societe de Promotion et de Financement Touristique (CARTHAGO)
Societe d'Entreposage de San-Pedro
Societe des Pipe-Lines de Strasbourg
Societe des Transports Petroliers par Pipe Line
Societe d'Etude et d'Exploitation de la Raffinerie du Tchad—S.E.E.R.A.T.
Societe d'Exploitation & de Developpment d'Operations Commerciales
Societe du Cacoutchouc Butyl (SOCABU)
Societe du Pipe Line de la Raffinerie de Lorraine
Societe du Pipe-Line Mediterranee-Rhone
Societe du Pipeline Sud-Europeen
Societe Esso de Rocherches et d'Exploitation Petrolieres Esso Rep
Societe Francaise Exxon Chemical
Societe "Geomines-Caen"
Societe Havraiso de Manutention de Produits Petroliera
Societe Hoteliere de la Potite Campagne
Societe Immobiliere Paris-Nial
Societe Ivoirienne d'Operations Petrolieres A.A.
Societe Malgache de Raffinage
Societe Reunionnaise d'Entreposage
Socony-Standard-Vacuum Oil Company (Petroleum Maatschappij)
Southern Natural Gas Development Pty. Ltd.
Standard Kosan Kabushiki Kaisha
Standard Service K.K.
Statfjord Transport A/S
Stockage Geologique de Gaz de Lavera

Sueddeutsche Erdgas Transport Gesellschaft mit beschraenkter Haftung
Sun East Company Ltd.
Syncrude Canada Ltd.
Synergistics Industries Limited
204383 Enterprises Limited
363011 Alberta Limited
369772 Alberta Inc.
393193 Alberta Inc.
TAR-Tankanlage Rumlang AG
TBN Tanklager-Betriebagesellschaft Nurnberg mbH
TGF Tankdienst Gesellschaft Frankfurt
TGM Tankdienst Gesellschaft Munchen
Taglu Enterprises Ltd.
Taihai Bussan K.K.
Taiko Sekiyu K.K.
Taisci Kogyo Sekiyu Hanbai K.K.
Takahama Kossan Kabushiki Kaisha
Takatsuru Yugyo K.K.
Tanaka Sekiyu Hanbai K.K.
Tankanlage A. G., Mellingen
Tanklager Altishausen A. G.
Tanklager Gesellschaft, Koln
Tanklager-Gesellschaft Tagel
Tanklager Lachelles I S.A.
Tanklager Taegerschen AG
Tecnica Quimica Petrolera, S.A. de C. V.
Tecumseh Gas Storage Limited
Texaco Canada Malaysia Inc.
THUMS Long Beach Company
Thyssengas G.m.b.H.
TIBA Speditions GmbH
Tos Nenryo Kogyo Kabushiki Kaisha
Tohko Plastics Company, Limited
Tohpren Co. Ltd.
Toko Sekiyu K.K.
Tonen Energy and Marine (Signapore) Pte. Ltd.
Tonen Energy International Corp.

Tonen Maintenance K.K.
Tonen Properties Inc.
Tonen Sekiyukagaku Kabushiki Kaisha
Tonen System Ploza Kabushiki Kaisha
Tonen System Service Kabushiki Kaisha
Tonen Tanker Kabushiki Kaisha
Tonen Technology K. K.
Tonex Company Limited
Tophus Quen Pty. Ltd.
Towa Compounding Co. Ltd.
Towa Sekiyu K.K.
Toyoshina Film Company, Ltd.
Transalpine Oelleitung in Oesterreich Gesellschaft m.b.H.
Trans-Arabian Pipe Line Company
Trans-Northern Pipelines Inc.
Transgas Lavera
Trimin Resources Inc.
Taurumaru Unyu K.K.
Turkish Petroleum Company, Limited
UBAG—Unterflurbetankungsanlage Flughafen Zurich
Ulen Coal Mines Limited
United Industry Development Co., Ltd.
United Collieries Pty. Limited
Van Salt Water Disposal Company
W.A.G. Pipeline Proprietary Limited
Wako Jushi Kabushiki Kaisha
Wako Kasei Kabushiki Kaisha
Wartempomp Nederland B.V.
Westdeutsche Erdoelleitungs-G.m.b.H.
Westgas G.m.b.H.
Westgastransport B.V.
Winnipeg Pipe Line Company Limited
Worex S.N.C.
Yasaka Sekiyu K.K.
Yellowstone Pipe Line Company
Yoshiki Sekiyu Kabushiki Kaisha
Yoshimi Gas Kabushiki Kaisha
Yuso Sekiyu K.K.
Yugen Kaisha Nishi Kobe Bosai Center

MOBIL OIL CORPORATION

ABORAY PTY LIMITED
ABU DHABI PETROLEUM COMPANY LIMITED
ACE POLYMER CO., LTD.
ADRIA WIEN PIPELINE GESMBH
AIMCO (ALPHA) SHIPPING COMPANY
AIMCO (OMEGA) SHIPPING COMPANY LTD.
AIRCRAFT FUEL SUPPLY B.V.
AIRTANKDIENST KOELN
AK CHEMIE GMBH & CO. KG
AKAUMA ASPHALT INDUSTRIES, LTD.
ALEXANDROUPOLIS PETROLEUM INSTALLATION S.A.
ALPHA-ALET VE DAYANIKLI TUKETIM MAMULLERI PAZARLAMA A.S.
ALTONA PETROCHEMICAL COMPANY LIMITED
AMMENN GMBH
ANDREWS OIL PTY. LIMITED
ANKARA GAZ SATIS A.S.
ARABIAN AMERICAN OIL COMPANY
ARABIAN CHEMICAL TERMINALS
ARABIAN INTERNATIONAL MARITIME COMPANY
ARABIAN INTERNATIONAL MARITIME COMPANY LIMITED
ARABIAN SHIPPING & TRADING CO. S.A.
ARABIAN TRADING CO. S.A.
ARAL AKTIENGESELLSCHAFT
ATAS ANADOLU TASFIYEHANESI A.S.
ATLAS SAHARA S.A.
AUSTRALIAN SYNTHETIC RUBBER CO LIMITED
AUTOBAHN-BETRIEBE GESELLSCHAFT MBH
AVIATION FUEL SERVICES LIMITED
AYGAZ A.S.
BALGEE OIL PTY. LIMITED
BANGKOK AVIATION FUEL SERVICES LIMITED
BAYERISCHE ERDGASLEITUNG GMBH
BAYERISCHE MINERAL-INDUSTRIE AG
BEER GMBH
BEER GMBH & CO. MINERALOEL-VERTRIEBS-KG

BIN SULAIMAN MOBIL TOWERS
BUFFALO RIVER IMPROVEMENT CORPORATION
BUTEY SARL
CANADIAN SUPERIOR OIL (AUST.) PTY. LTD.
CANNER'S STEAM COMPANY, INC.
CANYON REEF CARRIERS, INC.
CARBURANTI, LUBRIFICANTI E AFFINI MERIDIONALI—CLEAM S.P.A.
CARPI GAS S.R.L.
CAS (COMBINED AUTOMATION SYSTEM) B.V.
CEED DESIO S.R.L.
CELMISIA SHIPPING CORPORATION
CENTRAL AFRICAN PETROLEUM REFINERIES (PRIVATE) LIMITED
CERCERA SA
CHANGI AIRPORT FUEL HYDRANT INSTALLATION PTE. LTD.
CHARBONNIERE DE MASSY—PIERRE MARIE
COBAR PTY. LIMITED
COLLINS PIPELINE COMPANY
COLOMBIANOS DISTRIBUIDORES DE COMBUSTIBLES, S.A. "CODI"
COLONIAL PIPELINE COMPANY
COMBUSTIBLES COLMERAUER
COMET BRENNSTOFFDIENST GMBH
COMMERCIAL POLYMERS PTY. LIMITED
COMMODORE MARITIME COMPANY S.A.
COMPAGNIE AFRICAINE DE TRANSPORT CAMEROUN (CAT.CN)
COMPAGNIE D'ENTREPOSAGE COMMUNAUTAIRE
COMPAGNIE DES PETROLES PRIMAGAZ
COMPAGNIE REGIONALE DE DISTRIBUTION DE PRODUITS PETROLIERS (CO.RE.DIS)
COMPAGNIE SENEGALAISE DES LUBRIFIANTS
COMPANIA DE LUBRICANTES DE CHILE LIMITADA (COPEC MOBIL LTDA.)
COMPANIA MEXICANA DE ESPECIALIDADES INDUSTRIALES, S.A. DE C.V.

CONSORTIUM RAYMOND DUEZ
COOK INLET PIPE LINE COMPANY
CORCOP
CRC LYON CHAUFFAGE
CRCP
CYPRUS PETROLEUM REFINERY LIMITED
DEBA S.R.L. INDUSTRIA PETROLIFERA
DEPOSITI GENOVESI S.P.A.
DEPOT PETROLIER DE MOUREPIANE
DEPOT PETROLIER DU GRESIVAUDAN
DEPOTS DE PETROLE COTIERS
DEPOTS PETROLIERS DE LA CORSE (DPLC)
DEUTSCHE PENTOSIN-WERKE GMBH
DEUTSCHE TRANSALPINE OELLEITUNG GMBH
DICOMI S.R.L.
DIXIE PIPELINE COMPANY
DUKHAN SERVICES COMPANY W.L.L.
DUPONT & DEWULF N.V.
EAST TEXAS SALT WATER DISPOSAL COMPANY
ENERGAS S.R.L.
ENERGIE ALPES
ENERGIE NORD DISTRIBUTION
ENTREPOT PETROLIER DE MULHOUSE
ENTREPOT PETROLIER DE NANCY
ENTREPRISE ALEXANDRE VIDAL
ENTREPRISE JEAN LEFEBVRE
ERDGAS-VERKAUFS-GESELLSCHAFT MBH
ERDOEL-RAFFINERIE NEUSTADT GMBH & CO. OHG
ERDOL-LAGERGESELLSCHAFT M.B.H.
ETABLISSEMENTS BOUTHENET
ETABLISSEMENTS JOSEPH WALLACH
ETABLISSEMENTS ROHRMANN DUPOSSE
ESTABLISSEMENTS STARCH & CIE
ETS. LATHUILLERE
EUROPETROL S.P.A.
FAIRWIND MARITIME COMPANY S.A.
FELIX OIL COMPANY

FIAMMA LAZIALE S.P.A.
FIBIL SA
FILTROS DE COSTA RICA, S.A.
FIOUL ASSISTANCE SERVICE
FRUEHMESSER GMBH
FRUEHMESSER MINERALOLHANDELS GMBH & CO. KG
FUSO OPERATIONS KABUSHIKI KAISHA
GATWICK REFUELLING SERVICES LIMITED
GAZAL-GAZ ALETLERI A.S.
GEOMINES-CAEN
GEOVEXIN
GHANA BUNKERING SERVICES LIMITED
GUZZARDI PETROLEUM (GIPPSLAND) PTY. LIMITED
HANIEL HANDEL GMBH
HEIZOL-HANDELSGESELLSCHAFT MBH
HELLAS GAS STORAGE CO. S.A.
HYDRANTEN-BETRIEBS-GESELLSCHAFT FLUGHAFEN/FRANKFURT
IMBERT G. DISTRIBUTION DE PRODUITS PETROLIERS
INDUSTRIA INTERAMERICANA DE FILTROS LTDA. "INTERFIL"
INTO PLANE SERVICES—I.P.S.—S.R.L.
INTOPLANE SERVICES COMPANY LIMITED
IRANIAN OIL PARTICIPANTS LTD.
IRANIAN OIL SERVICES (HOLDINGS) LTD.
IRANIAN OIL SERVICES LIMITED
IRAQ PETROLEUM COMPANY LIMITED
IRAQ PETROLEUM PENSIONS LIMITED
ISIDE S.P.A.
ISTANBUL PETROL VE MAKINA YAGLARI LTD. STI.
ITALOIL S.R.L.
JAPAN AIRPORT FUELING SERVICE COMPANY, LTD.
JECOP

JET AVIATION SAUDI ARABIA COMPANY LIMITED
JOLLY GAS LAZIALE S.R.L.
K.K. NIPPATSU
K.K. SANKYO PLASTICS
K.K. TORESEN
KANSAI PETRO-TERMINAL CO., LTD.
KANTO KYGNUS SEKIYU HAMBAI K.K.
KARL STORZ GMBH & CO. KG
KAWASAKI KYGNUS SEKIYU HAMBAI K.K.
KEIYO SEA-BERTH COMPANY, LTD.
KELINDA PTY LIMITED
KLAUS KOEHN GMBH
KLAUS KOEHN GMBH & CO. MINERALOEL KG
KUEBLER HEIZOL A.G.
KUMOSAR S.R.L.
KURT AMMENN GMBH & CO. KG
KYGNUS EKKA GAS KABUSHIKI KAISHA
KYGNUS KOSAN KABUSHIKI KAISHA
KYGNUS MARKETING SERVICE K.K.
KYGNUS SEKIYU KABUSHIKI KAISHA
KYOKUTO PETROLEUM OVERSEAS, LTD.
KYOKUTO SEKIYU KOGYO KABUSHIKI KAISHA
LA CENTRAFRICAINE DES PETROLES
LES NOUVEAUX COMPTOIRS PETROLIERS
LIPET-LIKIT PETROL GAZI VE YAKIT TICARET A.S.
LUBLEND LIMITED
LUBRICANTES DEL SUR, S.A.
MARCEAUX & CIE
MARS-MILAN AIRPORT REFUELLING SERVICE S.R.L.
MATCO TANKERS (U.K.) LIMITED
MEENTZEN & FRANKE GMBH & CO.
MERITRANS S.P.A.
MERTL GMBH
MID STATE PETROLEUM PTY LIMITED
MINERALOEL-HANDELS-GESELLSCHAFT MBH

MINERALOELWERK WEDEL GMBH & CO. OHG
MOBIL CATALYSTS CORPORATION OF JAPAN
MOBIL CORPORATION (Parent)
MOBIL KOREA LUBE OIL, INC.
MOBIL MOTOR REST SA
MOBIL OIL DE MEXICO, S.A. DE C.V.
MOBIL OIL FRANCAISE
MOBIL OIL GABON
MOBIL OIL GHANA LIMITED
MOBIL OIL MAROC
MOBIL OIL NIGERIA LIMITED
MOBIL POLYMERS INTERNATIONAL SARL
MOBIL PRODUCING CAMEROON INC.
MOBILGAZ MOBIL PETROL GAZLARI A.S.
MOTEL REST SA
MT. MARROW BLUE METAL QUARRIES PTY. LIMITED
N.V. ROTTERDAM-RIJN PIJPLEIDING MAATSCHAPPIJ
N.V. SOCONY-STANDARD-VACUUM OIL COMPANY (PETROLEUM MAATSCHAPPIJ)
NEAR EAST DEVELOPMENT CORPORATION
NEW ZEALAND SYNTHETIC FUELS (HOUSING) CORPORATION LIMITED
NEW ZEALAND SYNTHETIC FUELS CORPORATION LIMITED
NICHIMO OIL (BERMUDA) CO., LTD.
NICHIMO SEKIYU SEISEI KABUSHIKI KAISHA
NIPPON UNICAR COMPANY, LIMITED
NORDDEUTSCHE ERDGAS-AUFBEREITUNGS-GESELLSCHAFT MBH
NORVAC PTY. LIMITED
NOTTINGHAM GAS LIMITED
NOVODIS
OLDENBURGISCHE ERDOEL GESELLSCHAFT MBH
P.T. ARUN NATURAL GAS LIQUEFACTION COMPANY
P.T. BERAU COAL
P.T. STANVAC INDONESIA
PALOMA PIPE LINE COMPANY

PARS INVESTMENT CORPORATION (PRIVATE COMPANY)
PAUL HARLING MINERALOEL GMBH & CO. KG
PEACE PIPE LINE LTD.
PERKAL PTY. LIMITED
PERRETTI PETROLI S.P.A.
PETROCAB
PETROCAM PTY LIMITED
PETROGAS PROCESSING LTD.
PETROL FUEL S.P.A.
PETROL TEAM S.P.A.
PETROLEUM REFINERIES (AUSTRALIA) PTY. LIMITED
PETROLEUM SERVICES (MIDDLE EAST) LIMITED
PETROMIN LUBRICATING OIL COMPANY
PETROMIN LUBRICATING OIL REFINING COMPANY
PETROMIN-MOBIL YANBU REFINERY COMPANY LTD.
PLEGADIZOS PARA LA INDUSTRIA, S.A.
PRESNALL PTY. LIMITED
PROGAS LIMITED
P6-GROEP B.V.
RAINBOW PIPE LINE COMPANY, LTD.
RED SEA PLASTIC FACTORY COMPANY LIMITED
RHODES PETROLEUM INSTALLATION S.A.
ROHOL-AUFSUCHUNGS GESELLSCHAFT MBH
RUHRGAS AKTIENGESELLSCHAFT
RUNDEL MINERALOELVERTRIEB GMBH
S.C. BRUSSELS AIRFUELS SERVICES C.V.
SABA-SOCIEDADE ABASTECEDORA DE AERO-NAVES, LDA.
SARL ETABLISSEMENTS MICHEL FAURE
SAUDI CHEMICAL INDUSTRIES COMPANY LTD.
SAUDI MARITIME COMPANY LTD.
SAUDI TANKERS LIMITED
SAUDI YANBU PETROCHEMICAL CO.
SCHUBERT KOMMANDITGESELLSCHAFT

SEGHER DE MEXICO, S.A. DE C.V.
SEIBU KYGNUS SEKIYU HAMBAI K.K.
SENERCO
SERAM S.P.A.
SIERRA LEONE PETROLEUM REFINING COMPANY LIMITED
SOCIETA' ITALIANA PER L'OLEODOTTO TRANSALPINO-SIOT S.P.A.
SOCIETE "LES FILS DE FERRERO"
SOCIETE AFRICAINE DE RAFFINAGE (S.A.R.)
SOCIETE ANONYME DE GESTION DES STOCKS DE SECURITE
SOCIETE BELGE DE TRANSPORT PAR PIPELINE S.A.
SOCIETE BRETONNE DE DISTRIBUTION DE PRODUITS PETROLIERS
SOCIETE CAMEROUNAISE DE DEPOTS PETROLIERS (S.C.D.P.)
SOCIETE D'ENTREPOSAGE DE GABES
SOCIETE D'ENTREPOSAGE DE SAN PEDRO
SOCIETE D'ENTREPOSAGE PETROLIER AU BURUNDI (SEP BURUNDI)
SOCIETE DE CONSTRUCTION & DE GESTION CB.12
SOCIETE DE GESTION DES STOCKS PETROLIERS DE COTE D'IVOIRE (GESTOCI)
SOCIETE DE MANUTENTION CARBURENTS AVIATION DE TAHITI (SOMCAT)
SOCIETE DE MANUTENTION DE CARBURANTS AVIATION (S.M.C.A.)
SOCIETE DE MANUTENTION DE CARBURANTS AVIATION DAKAR-OFF
SOCIETE GABONAISE D'ENTREPOSAGE DE PRODUITS PETROLIERS
SOCIETE GABONAISE DE RAFFINAGE
SOCIETE IVOIRIENNE DE FABRICATION DE LUBRIFIANTS (S.I.F.A.L.)
SOCIETE IVOIRIENNE DE RAFFINAGE
SOCIETE JEAN ROUSSEL S.A.

SOCIETE MALIENNE D'ENTREPOSAGE (S.M.E.)
SOCIETE MAURITANIENNE D'ENTREPOSAGE DE PRODUITS PETROLIERS
SOCIETE NATIONALE DE RAFFINAGE
SOCIETE NORDISTE DE CARBURANTS
SOCIETE NORMANDE DE COMBUSTIBLES ET LUBRIFIANTS-NICOL
SOCIETE PIZO DE FORMULATION DE LUBRIFIANTS
SOCIETE REGIONALE DE PRODUITS ENERGETIQUES
SOCIETE REGIONALE DE PRODUITS PETROLIERS
SOCIETE STATION-SERVICE LUNES
SOCIETE TAHITIENNE DE DEPOTS PETROLIERS
SOCIETE TAHITIENNE DES OLEODUCS (STDO)
SOCIETE TCHADIENNE D'ENTREPOSAGE DE PRODUITS PETROLIERS
SOCIETE TOGOLAISE D'ENTREPOSAGE
SOCIETE VIGNAND
SOMODIP
SOUTH SASKATCHEWAN PIPE LINE COMPANY
STATFJORD TRANSPORT A.S.
STE CAMEROUNAISE EQUATORIALE DE FABRICATION DE LUBRIFIANTS (S.C.E.F.L.)
STE DES BITUMES & CUT-BACKS DU CAMEROUN (S.B.C.B.C.)
STRASBURGER ENTERPRISES (PROPERTIES) PTY. LIMITED
SUN EAST COMPANY, LIMITED
SYDNEY METROPOLITAN PIPELINE PTY. LIMITED
T&M TERMINAL COMPANY
TANKBAU-GMBH
TANKLAGERGESELLSCHAFT KOELN-BONN
TAR TANKANLAGE RUEMLANG AG
TECKLENBURG GMBH
TECKLENBURG GMBH & CO. ENERGIEBEDARF KG
TGF TANKDIENST-GESELLSCHAFT FRANKFURT

THAILAND SOLVENT PRODUCTS LIMITED
THE ARABIAN ENERGY COMPANY LIMITED
THE ARABIAN PETROLEUM SUPPLY CO. (S.A.)
THE NEW ZEALAND REFINING COMPANY LIMITED
THE SAUDI CAN COMPANY LTD.
THUMS LONG BEACH COMPANY
TOHKO PLASTICS COMPANY, LIMITED
TOHPREN CO., LTD.
TONEN CORPORATION
TONEN ENERGY AND MARINE (SINGAPORE) PTE. LTD.
TONEN ENERGY INTERNATIONAL CORPORATION
TONEN PROPERTIES INC.
TONEN SEKIYUKAGAKU KABUSHIKI KAISHA
TONEN SYSTEM PLAZA INC.
TONEN TANKER KABUSHIKI KAISHA
TONEN TAPYRUS COMPANY LIMITED
TONEN TECHNOLOGY KABUSHIKI KAISHA
TONEX COMPANY LIMITED
TOWA COMPOUNDING COMPANY, LIMITED
TOYOSHINA FILM COMPANY, LIMITED
TRADEWIND MARITIME CO. S.A.
TRANS-ARABIAN PIPE LINE COMPANY
TRANSALPINE OELLEITUNG IN OESTERREICH GESELLSCHAFT M.B.H.
TRESKOME PTY. LIMITED
TRINITY PETROLEUM SERVICES PTY. LIMITED
TRYICE PTY LIMITED
TURKISH PETROLEUM COMPANY LIMITED
TWIFO OIL PALM PLANTATIONS LIMITED
UBAG UNTERFLUR-BETANKUNGSANLAGE AG
UNITED KINGDOM OIL PIPELINES LIMITED
VALODIA
W.A.G. PIPELINE PTY. LIMITED
WAKO JUSHI KABUSHIKI KAISHA
WAKO KASEI KABUSHIKI KAISHA
WALTON-GATWICK PIPELINE COMPANY LIMITED

WERNER WEIDEMANN MINERALOELVERTRIEB GMBH
WEST LONDON PIPELINE AND STORAGE LIMITED
WEST SHORE PIPE LINE COMPANY
WILHELM MERTL GMBH & CO. KG
WIRI OIL SERVICES LIMITED
WOLVERINE PIPE LINE COMPANY
WYMONDHAM OIL STORAGE CO. LIMITED
YPERSE OLIEFABRIEK JOS DEWULF HENRI N.V.
ZAIRE MOBIL OIL
ZAIRE S.E.P.

SHELL OIL COMPANY *

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Oil Insurance
Limited Pioneer Equipment Co.
Seadock, Inc.
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East Texas Salt Water Dispoal Company
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Norsk Texaco Oil A/S
S.A. Texaco Belgium N.V.
S.A. Texaco Petroleum N.V.
Texaco A/S
Texaco Britain Limited
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